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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 181

EMIL RECK,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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Citations to Opinions Below and to Related Opinions

The majority and dissenting opinions of the Court of Appeals are set forth in Appendix A to the Petition for Certiorari and are reported at 274 F.2d 250 (7th Cir. 1960). The judgment of the Court of Appeals is set forth in Appendix B to the Petition for Certiorari. The opinion of the District Court is set forth in Appendix C to the Petition for Certiorari and is reported at 172 F. Supp. 734 (N.D. Ill. 1959). A prior opinion of the Supreme Court of Illinois, affirming the denial of relief to petitioner under the Illinois Post Conviction Hearing Act, is reported in *Reck* v. *People*, 7 Ill.2d 261 (1955). The prior order of the Supreme Court of the United States denying a peti-

tion for writ of certiorari to the Supreme Court of Illinois is reported in *Reck* v. *Illinois*, 351 U.S. 942 (1956).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The judgment of the Court of Appeals was entered on January 13, 1961. The petition for a writ of certiorari was filed on April 3, 1960, and was granted, with leave to proceed *in forma pauperis*, on June 27, 1960. 363 U.S. (Adv.) 838.

Constitutional Provisions and Statutes Involved

U. S. Constitution, Amendment XIV, Section 1:

"... nor shall any State deprive any person of life, liberty or property, without due process of law ..."

28 U.S.C. §2241:

"(a) Writs of habeas corpus may be granted by ... the district courts ...

* * * * * *

"(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States ..."

Questions Presented

1. Is it not a denial of due process to permit the prosecution, in a murder trial, to introduce in evidence the confessions of a mentally retarded teen-aged defendant

obtained from him during an eight-day *incommunicado* detention, in the course of which he received virtually no food and repeatedly fainted, vomited blood, was hospitalized, and was denied access to family and counsel?

2. Was it not a denial of due process in 1936 to permit the introduction into evidence of confessions obtained under the above circumstances?

3. Is it not a denial of due process to permit the prosecution, in a murder trial, to introduce in evidence the confessions of a defendant whose corroborated testimony of police brutality, although denied by the police, is the only plausible explanation for his physical collapse, vomiting of blood and emergency hospitalization while in police custody?

Statement

A. The Record:

On November 23, 1960 the Clerk instructed Counsel to proceed upon the original papers comprising the transcript of record in this Court. Citations to the record in this brief therefore refer to the page numbers of the original transcripts rather than to the usual printed record.[1]

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[1] Citations herein to the transcript of proceedings in the District Court below (which is separately bound with blue paper covers and whose pages are separately numbered) will be made in the customary form, e.g., "R. 25."

Citations to testimony contained in the State Court transcripts received in evidence as Exhibits 1 and 2 by the District Court will be made by designating the appropriate exhibit, the page number therein, the name of the witness, and the party who called him to the stand: e.g., "Ex. 2, p. 912 (Officer Reilly, State's Witness); Ex. 1, p. 716 (Dr. Weissman Defense Witness)."

In the record, Exhibit 1 is composed of five transcripts bound in blue or brown paper covers, with their pages consecutively

B. The Procedural History:

Petitioner Emil Reck seeks reversal of a decision of the Court of Appeals for the Seventh Circuit (Duffy, *J.*, dissenting), which affirmed an order of the District Court for the Northern District of Illinois quashing a writ of habeas corpus.

Respondent Joseph E. Ragen is the Warden of the Illinois State Penitentiary at Joliet, Illinois, and has custody of Petitioner Reck.[1a] Emil Reck was convicted of murder in the courts of Illinois in 1936. He was sentenced to 199 years in prison and is serving that sentence now.[2]

Reck claims that two written confessions, obtained from him by police officers and received in evidence against him, were coerced and that his imprisonment therefore is in violation of the due process clause of the Fourteenth Amendment. In a post-conviction hearing, in an appeal to the Illinois Supreme Court, and in a timely prior peti-

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numbered throughout. These page numbers appear in red figures in the lower left corner of each page.

Exhibit 2 is composed of two volumes bound with black boards, with their pages numbered consecutively throughout. These page numbers are typed at the bottom of each page.

Exhibit 1 includes (1) the common law record of Reck's trial in the Criminal Court of Cook County (pp. 11-47), (2) the record of Reck's post-conviction hearing (pp. 235-497), (3) the proceedings at Reck's trial from the time the jury was impanelled until the judge, after a hearing outside the presence of the jury, denied the motion to suppress the confessions (pp. 498-980), (4) the text of the confessions (pp. 981-1075), and (5) the pre-trial sanity proceedings (pp. 1081-1114).

Exhibit 2 comprises all of the trial proceedings subsequent to the judge's denial of the motion to suppress the confessions.

[1a] R. 5 (Petition for Habeas Corpus).

[2] Ex. 2, pp. 1099-1100 (Announcement of Judgment by Judge Burke); R. 4-5 (Petition for Habeas Corpus).

tion for certiorari to this Court, Reck has asserted this claim.[3]

In its prior denial of certiorari, this Court stated that its order was "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." *Reck* v. *Illinois*, 351 U.S. 942 (1956).

Accordingly, Reck filed his petition for habeas corpus.[4] The writ issued, and at the hearing the District Court received into evidence the transcripts of all proceedings in the Illinois courts, including more than 1,000 pages of transcript which were not before this Court on the prior application for certiorari.[5] Subsequently, the District Court denied the requested relief, holding that *although by current standards Reck had been denied due process of law,* a new trial must be denied him because the Fourteenth Amendment did not, as of the time of Reck's conviction, forbid the use of coerced confessions unless there was a clear showing of physical brutality.[6] The Court of Appeals ignored the District Court's theory but affirmed its result, holding that Reck's confessions were not the result of coercion, psychological or otherwise. Judge Duffy dissented, terming portions of the majority opinion "amazing"[7] and citing five recent decisions of this Court which the majority had ignored.[8]

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[3] See the papers in *Reck* v. *Illinois*, 351 U.S. 942 (1956), No. 579 Misc., Oct. Term, 1955.

[4] R. 4-12 (Text of Petition for Habeas Corpus).

[5] R. 65-66 (Stipulation). These additional pages of transcript comprise Exhibit 2 of the record.

[6] R. 43, 52, 54; Petition for Certiorari, Appendix C, pp. 27, 32-33, 34; 172 F. Supp. at 742, 745.

[7] Petition for Certiorari, Appendix A, p. 7; 274 F.2d at 254.

[8] Petition for Certiorari, Appendix A, p. 9; 274 F.2d at 255.

C. The Crime, Confession and Conviction:

On January 3, 1936, Dr. Silber C. Peacock, a Chicago physician, was found murdered on the floor of his automobile. He was dead from a bullet wound and 13 deep lacerations in his head.[9] Three months later, on Wednesday, March 25, 1936, the Chicago police arrested four teenaged boys for bicycle theft. One of these boys was Emil Reck. On Saturday, March 28, after 80 hours of incommunicado detention and interrogation, culminating in violent illness and hospitalization, Emil Reck participated with the other three boys in a joint confession to the Peacock murder. Their individual confessions were taken on the following day.[10]

Two of the boys, Durland Nash and Robert Goethe, pleaded guilty.[11] Emil Reck and the fourth boy, Michael Livingston, pleaded not guilty, claiming their confessions were extracted from them by police torture. Both boys were jointly tried for murder; their confessions were received in evidence over their objections,[12] and they were convicted.[13]

D. The Mentality and Personality of Emil Reck:

The following summary of the facts concerning the mentality and personality of Emil Reck is based solely upon uncontroverted facts in the record.

The District Court below found as a fact that "Reck was a mentally retarded boy with a general weak character

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[9] R. 22; Petition for Certiorari, Appendix C, p. 12; 172 F. Supp. at 735.

[10] R. 22, 29-30, 41-43; Petition for Certiorari, Appendix C, pp. 13, 17-18, 25-26; 172 F. Supp. at 735, 737-38, 741-42.

[11] Ex. 1, pp. 882, 901 (Stipulations).

[12] Ex. 1, pp. 551, 981.

[13] Ex. 2, pp. 1099-1100.

and no previous criminal record which might greatly affect his 'power of resistance.'" [14]

Emil Reck did not walk or talk until he was two and a half years old.[15] When he was eight, he was diagnosed as a "border-line mental defective." When he was twelve, he was classified as a "high-grade mental defective" and was placed in an institution for mental defectives[16] on a "feeble-minded petition." [17] At this time, the examining psychiatrist reported that Reck maintained a staring expression throughout their interview, the only change being a twisting of his mouth at one side; that answers had to be squeezed out of him; that he remained silent for a long time and questions had to be repeated in order to make him answer, which was often done by merely shaking his head or shrugging his shoulders. Reck was described as inert, sensitive ("tears come to his eyes when discussing his backwardness in school"), and lacking in initiative.[18]

In 1933, Reck dropped out of school when he was 16 years old. He was in the seventh grade.[19] His work record during the next three years was that of an unskilled adolescent during the worst of the depression. He spent almost a year in the C.C.C. and the P.W.A. He worked for a milkman one week. He had no other jobs.[20]

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[14] R. 41; Petition for Certiorari, Appendix C, p. 25; 172 F. Supp. at 741.

[15] Ex. 1, p. 25.

[16] Ex. 1, pp. 19, 31.

[17] Ex. 1, p. 26.

[18] Ex. 1, p. 28.

[19] Ex. 1, p. 15.

[20] Ex. 1, pp. 15, 16.

Aside from his retardation, Reck was never a behavior problem either in school or at home.[21] He never remained away from home overnight and seldom stayed out late.[22] He was very quiet[23] and neat.[24] He did not get into fights.[25] He had no peculiarities of conduct, mood, speech or appearance,[26] but was withdrawn, apathetic, reticent, and gave the "impression of general retardation."[27] He was considered a "weakling"[28] who would "cry pretty easily."[29] He had never been arrested and had no record of delinquency.[30]

At the time of his arrest, confession and conviction, Emil Reck was 19 years old.[31] Shortly before his trial, Reck was examined at the Behavior Clinic of the Criminal Court of Cook County. In that examination he was unable to state the result of dividing 25 by 5 and did not know how many weeks there are in a year, how many feet in a yard, how many quarts in a gallon, when Columbus discovered America, who fought in the Civil War, or the names of the capitals of Illinois, England, France, or Germany.[32]

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[21] Ex. 1, p. 19.

[22] Ex. 1, p. 29.

[23] Ex. 1, p. 28.

[24] Ex. 1, p. 29.

[25] Ex. 1, p. 27.

[26] Ex. 1, p. 14.

[27] Ex. 1, pp. 19, 28.

[28] Ex. 1, p. 27.

[29] Ex. 1, p. 882 (Goethe, Defense Witness).

[30] Ex. 1, p. 32.

[31] Ex. 2, p. 1093.

[32] Ex. 1, p. 17. Reck did, however, know some of the answers to simple problems in arithmetic, and some of the significant names

Dr. Harry R. Hoffman, director of the Behavior Clinic, found Reck of "dull normal intelligence," but without nervous or mental disorder, and he concluded that Reck was not committable as insane or feebleminded.[33]

Dr. Hoffman was the only expert witness called by either side at the trial to testify as to the mentality and personality of Emil Reck. He was a psychiatrist with many years experience. The State admitted his qualifications.[34] *He testified that Reck had the intelligence of a child between 10 and 11 years of age.*[35]

E. The Detention and Interrogation of Emil Reck by Police and Prosecutors:

The Illinois Supreme Court found that Reck "was in the custody of the police for a week, during which time he was frequently ill, fainted several times, vomited blood on the floor of the police station and was twice taken to the hospital on a stretcher. During that week no formal charge was placed against [Reck], and he was confined practically *incommunicado.*" *Reck* v. *People,* 7 Ill.2d 261, 264 (1955).

The following account of the manner in which the State procured Reck's confessions is based upon uncontroverted evidence except in those instances where conflicts in the testimony are specifically noted. Most of this account is based upon the evidence of the police officers, prosecutors, court reporters, and physicians who were called as witnesses by the State and for whose credibility the State necessarily vouched.

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in the history and geography of America. For example, Reck knew that the Mississippi was a big river, that New York was a big city, that Washington was our capital, and that President Hoover preceded President Roosevelt. *Ibid.*

[33] Ex. 1, p. 18.

[34] Ex. 2, pp. 352-54 (Dr. Hoffman, Defense Witness).

[35] Ex. 2, p. 363 (Dr. Hoffman, Defense Witness).

The First Day:

Reck was arrested at 11:00 A.M., Wednesday, March 25, 1936.[36] He was then at the home of Robert Goethe, where he had gone to eat,[37] Goethe, who like Reck was 19 years old,[38] was arrested also, and the boys were taken to a squad car where they found Durland "Jimmie" Nash, a third teen-aged prisoner of the police.[39] No resistance to the arrest was made.[40]

By 11:05 A.M. the three prisoners were in the 30th District (North Avenue) Police Station.[41] After ten minutes alone with Officer Susenbeck and a male secretary on the second floor of the Station, Reck was taken to the Shakespeare Avenue Police Station.[42] After two hours alone in a cell there,[43] Reck was returned by police wagon[44] to North Avenue, arriving at 1:15 P.M.[45]

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[36] Ex. 1, p. 908 (Officer Reilly, State's Witness); Ex. 1, pp. 927, 930; Ex. 2, p. 977 (Officer Susenbeck, State's Witness). The hour of the arrest is fairly inferable from Officer Susenbeck's testimony that Reck was in the North Avenue Police Station by "11:05 or 11:06 A.M." Ex. 2, p. 977.

[37] Ex. 2, p. 452 (Reck).

[38] Ex. 1, p. 1033 (People's Exhibit 9).

[39] Ex. 1, p. 373 (Reck). Nash was 19 years old, see Ex. 1, pp. 1032-33 (People's Exhibit 9). Livingston was arrested later the same day. Ex. 1, p. 752 (Livingston, Defense Witness). Livingston was 17 years old. Ex. 2, p. 1094 (Verdict).

[40] Ex. 1, pp. 603-06 (Reck). Arresting officers Ryan and Norton (Ex. 1, p. 938, Capt. O'Connell, State's Witness) were never called to testify as to the circumstances of the arrest despite Reck's testimony that one of the officers said to him at that time, "Let's see you run." Ex. 1, p. 605 (Reck).

[41] Ex. 1, pp. 927, 930; Ex. 2, p. 977 (Officer Susenbeck, State's Witness); Ex. 1, p. 908 (Officer Reilly, State's Witness).

[42] Ex. 2, pp. 977-78 (Officer Susenbeck, State's Witness).

[43] Ex. 1, pp. 614-15 (Reck).

[44] Ex. 2, p. 915 (Officer Reilly, State's Witness).

[45] Ex. 2, p. 978 (Officer Susenbeck, State's Witness).

At the North Avenue Station, Reck was taken to a large room on the police station's second floor and there interrogated until 6:30 or 7:00 P.M.[46] The questioning centered around the alleged theft of a saxophone[47] and some bicycles.[48] Officers Reilly and Susenbeck participated in the interrogation.[49]

At the conclusion of this 5½ hour session, Reck was taken in a police wagon to the Warren Avenue Police Station.[50] He was kept there in a cell all night.[51]

During his detention on Wednesday, Reck was given a ham sandwich and coffee at the North Avenue Station. He was not fed anything at all at the Shakespeare Station.[52]

The Second Day:

Reck's interrogation resumed when he was delivered by wagon men to the North Avenue Station at about 10:00 A.M. on Thursday.[53] At this point Reck had been in custody for some 23 hours.

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[46] Ex. 2, p. 978 (Officer Susenbeck, State's Witness); Accord: Ex. 2, p. 646 (Michael Livingston, Defense Witness); Accord: Ex. 2, p. 385 (Reck).

[47] Ex. 1, p. 909 (Officer Reilly, State's Witness); Accord: Ex. 2, p. 647 (Michael Livingston, Defense Witness); Accord: Ex. 1, pp. 640-41 (Reck).

[48] Ex. 1, pp. 649-50 (Reck).

[49] Ex. 1, pp. 294, 908-09; Ex. 2, pp. 915-16 (Officer Reilly, State's Witness); Ex. 2, pp. 978-80 (Officer Susenbeck, State's Witness).

[50] Ex. 1, pp. 653, 672; Ex. 2, p. 388 (Reck).

[51] Ex. 1, pp. 654, 672; Ex. 2, p. 389 (Reck).

[52] Ex. 1, pp. 654-55 (Reck). A typographical error in the District Court's opinion (R. 25-26; Pet. Cert. Appendix C, p. 15; 172 F. Supp. at 736-37) gives Reck three sandwiches or one more sandwich than he actually received.

[53] Ex. 2, p. 966 (Officer Kula, State's Witness).

Beginning at ten o'clock on Thursday morning, Reck was interrogated for some "six or seven hours" at North Avenue.[54] Approximately five officers participated in the questioning.[55] Among those present were Captain O'Connell,[56] Officer Susenbeck,[57] Officer Kula,[58] and, conspicuously, Officer Reilly, who claimed the "privilege" [59] of questioning Reck "all day".[60]

"A lot of questions" were asked.[61] Reilly was questioning his prisoner "about various crimes." He had a list "of every crime that was committed in the District." This list, said Reilly, "is what I am referring to as they would answer those questions." [62] But, Reilly testified, "there was not any purpose in [the] questioning." [63]

Eventually Reck was fed. He was given an egg sandwich and a bottle of milk but apparently nothing else.[64] There is no further testimony in the record as to food given Reck on Thursday.

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[54] Ex. 2, p. 966 (Officer Kula, State's Witness).

[55] Ex. 1, p. 893 (Nash, Defense Witness).

[56] Ex. 2, p. 1021 (Capt. O'Connell, State's Witness). Ex. 1, p. 893 (Nash, Defense Witness).

[57] Ex. 2, p. 976 (Officer Susenbeck, State's Witness); Ex. 2, p. 944 (Officer Reilly, State's Witness); Ex. 1, pp. 656-67, *passim.*: Ex. 2, pp. 389, 392, 394 (Reck).

[58] Ex. 2, p. 944 (Officer Reilly, State's Witness); Ex. 1, p. 893 (Nash, Defense Witness).

[59] Ex. 1, p. 295 (Officer Reilly, State's Witness).

[60] Ex. 1, pp. 296-97 (Officer Reilly, State's Witness).

[61] Ex. 2, p. 944 (Officer Reilly, State's Witness).

[62] Ex. 2, p. 944 (Officer Reilly, State's Witness).

[63] Ex. 1, p. 912 (Officer Reilly, State's Witness).

[64] Ex. 2, p. 973 (Officer Kula, State's Witness).

After the North Avenue police were finished with Reck for the day, he was sent to the Shakespeare Station. Later that night he was taken downtown to the Detective Bureau, where he was placed on exhibition at a so-called "show-up" in which the victims of various crimes are brought in "to view suspects to see if they can make an identification."[65] He was not returned that night.[66] The record is silent as to where, and under what conditions, Reck spent the night. Reck himself testified that he was too sick to remember anything that happened on Thursday night.[67] The State volunteered no information on this score and did not call the police officers who had Reck in their charge during this period.

On Thursday, Reck's father attempted to locate his son. He went to the North Avenue Station but could get no information concerning Reck's whereabouts.[68]

The Third Day:

Reck's father came to the North Avenue Station again on Friday but was not allowed to see his son.[69] The State again failed to disclose where, and under what conditions, Reck spent Friday morning. The record is silent as to the precise time when the police interrogation of Emil Reck resumed on Friday. Reck testified that questioning had been in progress for "five or six hours" prior to his first trip to the County Hospital on Friday evening.[70] This

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[65] Ex. 2, pp. 1030-31 (Capt. O'Connell, State's Witness).

[66] Ex. 2, pp. 1030-31 (Capt. O'Connell, State's Witness).

[67] Ex. 1, pp. 669, 673 (Reck). *Cf.*, Ex. 2, pp. 395, 396 (Reck).

[68] Ex. 2, p. 738 (Charles Reck, Defense Witness).

[69] Ex. 2, pp. 738-39 (Charles Reck, Defense Witness).

[70] Ex. 1, pp. 673, 674 (Reck).

statement was not disputed by the State's witnesses. Since Reck was first taken to the hospital at about 7:20 P.M.,[71] it thus appears that Reck's third day of interrogation began between 1:30 and 2:30 on the afternoon of Friday, March 27. At this point, Reck had been incommunicado for some 51 hours.

Early on Friday afternoon, Captain O'Connell, commander of the North Avenue Police District,[72] telephoned Prosecutor Wilbert Crowley and asked that an Assistant State's Attorney be dispatched to North Avenue to assist in interrogating some prisoners.[73] Blair Varnes from the prosecutor's office arrived at the station "about the middle of the afternoon" [74] and stayed with Reck "for about two and a half hours straight" while the police officers examined their prisoner.[75]

Police Officers Reilly, Breen and Bruns also attended Friday afternoon's examination.[76] Captain O'Connell was talking with the captive boys "quite a bit" during this period, too.[77] Police Officer Youhn was present at about 4:30 on Friday afternoon.[78]

By Friday evening, the four boys had become the focus of a major police effort. A "big show-up" was underway.[79] A "big crowd" of people ("a hundred or more") congre-

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[71] Ex. 1, p. 913; Ex. 2, pp. 922-23 (Officer Reilly, State's Witness).

[72] Ex. 1, pp. 931-32 (Capt. O'Connell, State's Witness).

[73] Ex. 1, p. 964; Ex. 2, pp. 226/45-46 (Crowley, State's Witness).

[74] Ex. 1, p. 425 (Varnes, State's Witness).

[75] Ex. 1, p. 959 (Varnes, State's Witness).

[76] Ex. 1, p. 959 (Varnes, State's Witness).

[77] Ex. 1, p. 939 (Capt. O'Connell, State's Witness).

[78] Ex. 2, p. 1016 (Officer Youhn, State's Witness).

[79] Ex. 2, p. 970 (Officer Kula, State's Witness).

gated in the Station.[80] Reck was being exhibited on the second floor.[81] Shortly after 7:00 P.M. Reck fainted.[82]

Unidentified persons assisted Reck to a bench.[83] Reck "was placed on a stretcher on the second floor and carried downstairs."[84] By 7:20 P.M. Reck was on his way to the Cook County Hospital[85] "in the customary district patrol wagon."[86]

At 7:45 P.M.[87] Reck was brought into the receiving room of County Hospital in a wheel chair.[88] The police officers who delivered Reck told the interne on duty that Reck had experienced an "attack and felt kind of dizzy,"[89] and had suffered "one or two fainting spells."[90] Reck told the in-

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[82] Ex. 1, p. 124; Ex. 2, p. 401 (Reck). (Officer Kula, State's Witness).

[81] Ex. 1, p. 403 (Sgt. Aitken, State's Witness).

[80] Ex. 2, p. 226/176 (Sgt. Aitken, State's Witness). Ex. 2, p. 971 The time must have been just after 7:00 P.M., because Sgt. Aitken saw Reck in the line-up at 7:00 P.M., and by 7:20 P.M. Reck was on his way to the hospital. See note 81, above, and note 83, below.

[83] Ex. 1, p. 916 (Officer Reilly, State's Witness). According to Reilly, he asked Reck what was the matter, and Reck said: "I am a little constipated and have not went for a couple of days. . . . Oh, I get this way every once in a while." *Ibid.* Compare People's Exhibit 12, the Cook County Hospital Record on Reck: "constipation, none." Ex. 2, p. 1006.

[84] Ex. 1, p. 937 (Capt. O'Connell, State's Witness).

[85] Ex. 1, p. 913; Ex. 2, p. 923 (Officer Reilly, State's Witness).

[86] Ex. 1, p. 937 (Capt. O'Connell, State's Witness).

[87] Ex. 2, p. 954 (Dr. Wilkey, State's Witness).

[88] Ex. 2, p. 959 (Dr. Wilkey, State's Witness).

[89] Ex. 2, p. 958 (Dr. Wilkey, State's Witness).

[90] Ex. 1, p. 944 (Dr. Wilkey, State's Witness). This corroborates Reck's testimony (see note 82) and refutes Officer Reilly's curiously equivocal denial that Reck had fainted. Ex. 2, p. 924 (Officer Reilly, State's Witness).

terne that "he was sick, in pain . . . dizzy."[91] The interne examined Reck and found no marks or bruises on his body.[92] He then concluded that Reck "was not fit for the hospital" and "rejected" him.[93]

Reck was taken directly back to the North Avenue Police Station arriving there at 8:15 P.M.[94] He was placed on exhibition in a show-up.[95] Quite a number of police officers were in the room, together with the latest batch of civilian viewers.[96]

After a short period, Reck became sick[97] and Officer Reilly took him out of the show-up room and into an unfurnished handball court in the rear of the Station's second floor.[98]

Reilly said that he "did not want to have [Reck] annoyed,"[99] and thus Reilly "did not care to show him up to . . . anybody"[100] because he was ". . . feeling careful of [Reck's] feelings. . . ."[101] Therefore, Reilly saw to it

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[91] Ex. 2, pp. 958-959 (Dr. Wilkey, State's Witness).

[92] Ex. 2, pp. 954-955 (Dr. Wilkey, State's Witness).

[93] Ex. 2, p. 955 (Dr. Wilkey, State's Witness).

[94] Ex. 2, pp. 923, 926 (Officer Reilly, State's Witness).

[95] Ex. 2, p. 927 (Officer Reilly, State's Witness).

[96] Ex. 2, p. 927 (Officer Reilly, State's Witness).

[97] Ex. 2, p. 928 (Officer Reilly, State's Witness).

[98] Ex. 2, p. 928 (Officer Reilly, State's Witness).
Officer Reilly also described the handball court at Ex. 2, pp. 917-18.

[99] Ex. 2, p. 922 (Officer Reilly, State's Witness).

[100] Ex. 2, p. 921 (Officer Reilly, State's Witness).

[101] Ex. 2, p. 922 (Officer Reilly, State's Witness).

that the civilians were kept out of the room.[102] Reilly said he wanted Reck to rest.[103]

But Emil Reck got no rest. Almost immediately, Sergeant Andrew Aitken, assigned to the Peacock murder investigation,[104] entered the handball court.[105] With him were Sergeant Patrick McShane and Patrolman Timothy Donovan.[106] Besides Reck and the three police officers, no one else was in the room, nor did anyone else enter for some minutes.[107]

Aitken and the other officers stayed with Reck "rather uninterruptedly, almost constantly" for the next half-hour.[108] After 15 minutes, Reck was standing near a bench[109] which had been placed in the otherwise bare handball court for the purpose of letting Reck "rest" on it.[110] According to Sergeant Aitken, he then asked Reck the following question:

"Emil, have you seen any motion pictures or read any magazines relative to ballistics? That is the reason

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[102] Ex. 2, p. 922 (Officer Reilly, State's Witness).

[103] Ex. 2, p. 928 (Officer Reilly, State's Witness).

[104] Ex. 2, p. 226/164 (Sgt. Aitken, State's Witness).

[105] Ex. 2, pp. 226/165-166 (Sgt. Aitken, State's Witness).

[106] Ex. 2, pp. 226/167 (Sgt. Aitken, State's Witness). Officers McShane and Donovan were never called to testify as to the circumstances under which Reck was interrogated in the handball court at this time despite Reck's testimony that he was beaten during this period. Ex. 1, p. 676 (Reck).

[107] Ex. 2, pp. 226/167-68 (Sgt. Aitken, State's Witness).

[108] Ex. 2, p. 226/172 (Sgt. Aitken, State's Witness). This period extended from 8:30 P.M. to 9:00 P.M. *Ibid.*

[109] Ex. 2, p. 226/167 (Sgt. Aitken, State's Witness). Aitken fixed the time as "about 8:45." *Ibid.*

[110] Ex. 2, p. 929 (Officer Reilly, State's Witness).

why you disposed of your revolver for fear it may be traced back to the Doctor Peacock murder"?[111]

Aitken's version of what happened then is as follows:

"With that he sat down and slumped on the bench and became very pale. And I said, 'Are you sick?' A few moments later he answered, 'I am sick.' I says, 'What is wrong?' He says, 'I got some blood sickness while in the C. C. Camps.'"[112]

When Reck "slumped" to the bench, he doubled up forward from the waist.[113]

A Dr. Abraham was called into the handball court.[114] When Dr. Abraham entered the handball court, Reck was "extremely nervous."[115] Reck was also "exposed."[116] His pants were undone.[117] His shirt was unbuttoned and hanging outside of his pants.[118] He was rubbing his abdomen.[119] Dr. Abraham didn't know why Reck was "exposed," and no one told him. Reck told the doctor that he had a pain, pointing to his abdomen.[120] Dr. Abraham "examined" Reck for 30 to 60 seconds.[121]

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[111] Ex. 2, p. 226/165 (Sgt. Aitken, State's Witness).

[112] Ex. 2, p. 226/166 (Sgt. Aitken, State's Witness).

[113] Ex. 2, p. 226/170 (Sgt. Aitken, State's Witness).

[114] Ex. 2, p. 226/166 (Sgt. Aitken, State's Witness).

[115] Ex 1, pp. 949-50 (Dr. Abraham, State's Witness).

[116] Ex. 1, p. 951 (Dr. Abraham, State's Witness).

[117] Ex. 1, p. 951 (Dr. Abraham, State's Witness).

[118] Ex. 1, p. 952 (Dr. Abraham, State's Witness).

[119] Ex. 1, p. 952 (Dr. Abraham, State's Witness).

[120] Ex. 1, p. 951 (Dr. Abraham, State's Witness).

[121] Ex. 2, p. 503 (Dr. Abraham, Defense Witness).
As a State witness the doctor said his examination took 60 to 90 seconds, but admitted that he did not give Reck the sort of

After Dr. Abraham's 60-second check-up, Reck lay down on the bench.[122] But the police who were present throughout did not allow Reck to rest. When still more people entered the room to question Reck, he was told to get on his feet, and "the color went away from him again."[123] After a while, civilians were brought into the handball court to identify Reck. He was told to get up from the bench when anyone walked in.[124]

By 9:15 P.M. civilians were again being excluded from the handball court.[125] Although there were about fifty other people who were "anxious" to see Reck at this time, Reilly was keeping all of them out of the room.[126] One such person got the impression that he was being given "a run-around" when, after he "pushed through the crowd," the police told him that Reck "was injured"[127] "They told me he was hurt."[128]

Between 9:30 and 9:45 P.M.[129] Reck became ill for the fourth time in three hours. He "bent over and said he felt sick to his stomach" and vomited on the floor.[130] "He was

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examination that he would have given a private patient with the same complaint. Ex. 1, p. 950 (Dr. Abraham, State's Witness).

[122] Ex. 1, pp. 951-52 (Dr. Abraham, State's Witness).

[123] Ex. 1, p. 949 (Dr. Abraham, State's Witness).

[124] Ex. 1, p. 955 (Dr. Abraham, State's Witness); *Cf.* Ex. 2, pp. 226/173 (Sgt. Aitken, State's Witness).

[125] Reilly was excluding all civilians when Mr. Ruben arrived (Ex. 2, p. 921). Mr. Ruben arrived at 9:15 or 9:30 (Ex. 2, p. 927). (Officer Reilly, State's Witness).

[126] Ex. 2, pp. 921-22, 929 (Officer Reilly, State's Witness).

[127] Ex. 2, pp. 778-79 (Milton Ruben, State's Witness).

[128] Ex. 2, p. 779 (Milton Ruben, State's Witness).

[129] Ex. 2, p. 1009 (Officer Youhn, State's Witness).

[130] Ex. 2, p. 1009 (Officer Youhn, State's Witness).

bleeding from the mouth, in short gushes of blood: . . ." [131] "The blood seemed to come out of the corner of his mouth. . . ." [132] He bled for "two or three minutes." [133] Officer Youhn was present.[134] Officer Larke was also present[135] but was never called to testify despite Reck's testimony of being beaten at this time. Aitken was or was not present, depending upon whether one believes his testimony at the trial or his testimony at the post-conviction hearing.[136]

Dr. Abraham was called to examine Reck again.[137] When Dr. Abraham entered the handball court, he saw Reck lying on a stretcher.[138] Nearby was a pool of Reck's blood on the floor. The blood was "a bright red." [139] It covered an area a "foot square." [140] But Dr. Abraham did not even give Reck a 60-second examination this time.[141]

Minutes later,[142] at about 9:45 P.M.,[143] Reck was carried

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[131] Ex. 1, p. 405 (Sgt. Aitken, State's Witness).

[132] Ex. 1, p. 412 (Sgt. Aitken, State's Witness).

[133] Ex. 1, p. 413 (Sgt. Aitken, State's Witness).

[134] Ex. 2, p. 1014 (Officer Youhn, State's Witness).

[135] Ex. 2, p. 1014 (Officer Youhn, State's Witness).

[136] *Compare* Aitken's solemn denial that he saw Reck vomit blood or that he was even in the handball court at the time (Ex. 2, pp. 226/175-76, testimony at 1936 trial) *with* Aitken's vivid description of Reck's hemorrhaging when he testified 16 years later. (Ex. 1, pp. 405, 412).

[137] Ex. 2, p. 1012 (Officer Youhn, State's Witness).

[138] Ex. 1, p. 953 (Dr. Abraham, State's Witness).

[139] Ex. 1, p. 954 (Dr. Abraham, State's Witness).

[140] Ex. 1, p. 954 (Dr. Abraham, State's Witness).

[141] Dr. Abraham testified that the only time he ever examined Reck was when he fainted at 8:45 P.M., which was 45 minutes before Reck vomited blood. Ex. 1, p. 950.

[142] Ex. 2, p. 1013 (Officer Youhn, State's Witness).

[143] Ex. 2, p. 1014 (Officer Youhn, State's Witness).

on a stretcher[144] from the handball court to a waiting patrol wagon. Captain O'Connell gave orders to return Reck to the hospital as fast as possible.[145] At this time, according to the official Police Department "History of Sick or Injured Person," Emil Reck had been sick for three hours and was unable to walk without aid.[146] He had been in police custody for 59 hours.

Reck entered Cook County Hospital for the second time at 10:15 P.M. on Friday.[147] Police officers who carried Reck to the hospital informed Dr. Wilkey, the interne on duty at the hospital receiving room, that Reck had vomited blood. The doctor considered Reck, who had been brought in on a wheelchair,[148] an "emergency" case.[149] He made "a superficial examination" and ordered Reck carried to a hospital ward.[150]

After Reck was delivered to a ward, he was interviewed by Dr. Zachary Felsher.[151] The ever-present police informed Dr. Felsher that Reck had been vomiting blood;[152] Reck himself was uncommunicative.[153] Reck received in-

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[144] Ex. 1, p. 937; Ex. 2, p. 1028 (Capt. [redacted]onnell, State's Witness). Ex. 1, p. 953; Ex. 2, p. 505 (Dr. [redacted]raham, State's and Defense Witness).

[145] Ex. 1, pp. 917-18 (Officer Reilly, State's Witness).

[146] Ex. 2, pp. 1007-08 (People's Exhibit 12).

[147] Ex. 2, p. 1003 (People's Exhibit 12).

[148] Ex. 2, p. 961 (Dr. Wilkey, State's Witness).

[149] Ex. 2, p. 956 (Dr. Wilkey, State's Witness).

[150] Ex. 2, p. 955 (Dr. Wilkey, State's Witness).

[151] Ex. 1, pp. 734-35 (Dr. Felsher, Defense Witness).
Ex. 2, pp. 553-54 (Dr. Felsher, Defense Witness).

[152] Ex. 1, p. 735 (Dr. Felsher, Defense Witness).
Ex. 2, p. 555 (Dr. Felsher, Defense Witness).

[153] Although Felsher questioned Reck for "at least a half hour," Ex. 2, p. 553), Reck was able to tell him only that he had vomited some dark colored blood (Ex. 1, p. 735).

jections of morphine, atropine and ipecac from Dr. Weissman, another hospital physician,[154] who examined Reck but found him "rather uncooperative."[155] Dr. Weissman noticed that small encrustations of blood were present not only around the corners of Reck's mouth,[156] but also around his nostrils.[157] The drug injections were repeated once more during the course of the night.[158]

At about 2:00 A.M. on Saturday, March 28th, two physicians, Dr. Scatliff and Dr. Day, arrived at the County Hospital to view Emil Reck.[159] These gentlemen were members of a Chicago Medical Society committee which was assisting in the Peacock investigation.[160] In an effort to catch the killer, they had been working with the State's Attorney's office since the day Dr. Peacock's body was found, almost three months before.[161] Prosecutor Kearney had telephoned Drs. Scatliff and Day around midnight or 12:30 A.M.[162] Kearney wanted them to see if Reck or any of the other boys "had any marks of brutality or anything on them."[163] Although they had retired for the evening,[164] the doctors wanted to see Reck because they were curious about "police brutality."[165]

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[154] Ex. 1, p. 716 (Dr. Weissman, Defense Witness).

[155] Ex. 2, p. 538 (Dr. Weissman, Defense Witness).

[156] Ex. 1, p. 716 (Dr. Weissman, Defense Witness).

[157] Ex. 2, p. 1006 (People's Exhibit 12).

[158] Ex. 1, p. 716 (Dr. Weissman, Defense Witness).

[159] Ex. 1, p. 968 (Dr. Day, State's Witness).

[160] Ex. 2, p. 706 (Dr. Day, Defense Witness).

[161] Ex. 1, p. 343 (Kearney, State's Witness).

[162] Ex. 1, pp. 342-43 (Kearney, State's Witness).

[163] Ex. 1, p. 345 (Kearney, State's Witness).

[164] Ex. 1, p. 379 (Dr. Scatliff, State's Witness).

[165] Ex. 1, p. 386 (Dr. Scatliff, State's Witness).

Upon arrival at the hospital, the two doctors found that access to Reck was barred by a police officer stationed in the hallway outside of Reck's room. The guard informed them that no one could see Reck without Captain O'Connell's clearance.[166] The physicians were forced to telephone Captain O'Connell so that he could order the police guard to admit them to Reck's room.[167]

When Drs. Scatliff and Day entered Reck's hospital room, they made only a "cursory" examination of Reck.[168] Reck was asleep, so the doctors did not question him.[169] They felt that they "had no right to go over and make a physical examination of any sort." [170] Therefore they did not examine his abdomen, back, any part of his torso, or his legs.[171] Nor did they look at Reck's hospital chart.[172] The light in the room was inadequate so the two physicians used a small pencil-type flashlight.[173] A police officer was present throughout this "one or two" minute examination.[174]

The Fourth Day:

On Saturday morning Dr. Zachary Felsher of the Cook County Hospital talked with Reck about his condition.[175] This was the first time Reck had conversed with any civilian outside the presence of police officers since his arrest some

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[166] Ex. 2, p. 705 (Dr. Day, Defense Witness).

[167] Ex. 2, p. 705 (Dr. Day, Defense Witness).

[168] Ex. 2, p. 700 (Dr. Day, Defense Witness).

[169] Ex. 1, p. 970 (Dr. Day, State's Witness).

[170] Ex. 1, p. 972 (Dr. Day, State's Witness).

[171] Ex. 1, p. 969 (Dr. Day, State's Witness).

[172] Ex. 1, p. 970 (Dr. Day, State's Witness).

[173] Ex. 1, pp. 975-76 (Dr. Scatliff, State's Witness).

[174] Ex. 1, p. 969 (Dr. Day, State's Witness).

[175] Ex. 2, p. 556 (Dr. Felsher, Defense Witness).

70 hours before. In the "short time" they were together,[176] Reck told Dr. Felsher that the police had been beating him in the stomach.[177]

Prior to 9:30 A.M.,[178] Reck told Dr. Weissman also that he was in pain,[179] and that he had been beaten in the abdomen and chest over a three-day period.[180]

Reck's physical condition over the first three days of secret interrogation is dispassionately noted in the medical jargon of People's Exhibit 12, the official County Hospital history of Reck:

> ". . . fainting one day, hematamasis once, pain level masogastrium, two days. Patient states that about 2:00 P.M. during afternoon three days ago during a scuffle he was hit several times in the left masogastrium, chest, about the neck; and this occurred two days ago; again second evening he began to notice pain in left masogastrium, sharp, which did not move about; pain continued Thursday the same . . . Friday the pain became worse some time in the afternoon; he felt sick to his stomach, and then fainting. This occurred about 5:00 or 6:00, and finally he had a hematamasis, dark blood, he does not know whether there was any from his nose, he fainted again, and when he was questioned he was taken to Cook County Hospital. The pain was somewhat bad, and the nausea continued with weakness and dizziness. . . ." [181]

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[176] Ex. 1, p. 734 (Dr. Felsher, Defense Witness).

[177] Ex. 1, p. 736; Ex. 2, p. 557 (Dr. Felsher, Defense Witness).

[178] Captain O'Connell removed Reck from the hospital shortly after 9:30 A.M. Ex. 1, p. 937 (O'Connell, State's Witness).

[179] Ex. 2, p. 539 (Dr. Weissman, Defense Witness).

[180] Ex. 2, p. 541 (Dr. Weissman, Defense Witness).

[181] Ex. 2, pp. 1004-05 (People's Exhibit 12).

At the time when Reck recounted his story of police brutality to the physicians at County Hospital, he had not confessed to the Peacock murder; he had not conferred with any attorney; he had not talked with any member of his family; he had been effectively removed from free communication with the outside world; he could not have been coached.

On Saturday morning Reck's father had attempted to see his son in the hospital. Two police guards refused him admittance to Reck's bedside.[182] Although Reck was still suffering pain on the left side of his abdomen,[183] Captain O'Connell removed Reck from the hospital shortly after 9:30 A.M. in a wheel chair.[184] As soon as he had Reck in his car, O'Connell began questioning him.[185] Reck's fourth day of police interrogation had begun.

O'Connell drove Reck back to the North Avenue Station. He continued to question Reck after they arrived there.[186] O'Connell testified that he spent "possibly, four, five or six hours or so" questioning Reck after wheeling him out of the hospital.[187]

The unrelenting Reilly joined the interrogation of Reck.[188] The questioning was focused on the whereabouts of the

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[182] Ex. 2, p. 739 (Charles Reck, Defense Witness).

[183] Ex. 2, p. 1006 (People's Exhibit 12); Ex. 2, p. 539 (Dr. Weissman, Defense Witness).

[184] Ex. 1, p. 937; Ex. 2, p. 1029 (Captain O'Connell, State's Witness).

[185] Ex. 1, pp. 940-41 (Captain O'Connell, State's Witness).

[186] Ex. 1, pp. 940-41 (Captain O'Connell, State's Witness).

[187] Ex. 1, p. 940 (Captain O'Connell, State's Witness).

[188] I "never missed sticking right with him" at the North Avenue Station. Ex. 2, pp. 947-48 (Officer Reilly, State's Witness).

pistol which had been used to shoot Dr. Peacock.[189] Robert Goethe, one of the teen-agers who had been arrested with Reck on Wednesday and who had been subjected to a course of interrogation similar to Reck's, had told Reilly on Friday night that Reck had the gun.[190] Questioning about the gun continued through the morning and on into the afternoon at the North Avenue Station.[191] After several hours, Reck was placed in a car and driven to the State's Attorney's office, arriving there around 2:00 P.M.[192] Upon reaching the headquarters of the State's Attorney's staff, Reck was taken to a squad room for continued questioning by O'Connell, Reilly, Susenbeck and others.[193]

Reck was very free with his answers to the recurring questions about the Peacock murder gun. He told the police that the gun was in Lake Michigan at the end of Chicago Avenue.[194] But the police never looked for the gun there.[195] He told the police that he had given the gun to a boy named "Mike" who lived on Thomas Street; the police went house-to-house on Thomas Street but could find no "Mike."[196] He told the police that the gun was secreted "in back of a fence" near a "Chink's place at California and Division" Streets.[197]

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[189] Ex. 2, pp. 426-28 (Reck).

[190] Ex. 2, p. 945 (Officer Reilly, State's Witness).

[191] Ex. 2, p. 947 (Officer Reilly, State's Witness).

[192] Ex. 2, p. 1023 (Captain O'Connell, State's Witness; Ex. 2, p. 986 (Officer Susenbeck, State's Witness).

[193] Ex. 2, p. 948 (Officer Reilly, State's Witness); Ex. 2, p. 986 (Officer Susenbeck, State's Witness); Ex. 2, p. 412 (Reck).

[194] Ex. 2, pp. 939, 951 (Officer Reilly, State's Witness); Ex. 2, p. 426 (Reck).

[195] Ex. 2, p. 985 (Officer Susenbeck, State's Witness); Ex. 2, pp. 933, 939, 951 (Officer Reilly, State's Witness).

[196] Ex. 2, pp. 981, 985 (Officer Susenbeck, State's Witness).

[197] Ex. 2, p. 406; Ex. 1, p. 664 (Reck).

He told the police that he had given the gun to a boy named "Mattie" whose description, address, or last name he did not know.[198] He told the police that the gun was in his father's basement shed,[199] under a stairway,[200] or in a coal pile.[201] Several officers did go to his home and searched the basement, but they found nothing.[202]

As Captain O'Connell put it, "There had been about three or four stories told of where guns were disposed of . . ."[203] Apparently each of the four murder suspects had his own version of where they had hidden the murder gun. "Their stories did not jibe," said Captain O'Connell, "and there was no use in looking."[204] Therefore, after the futile search for "Mike" and the fruitless ransacking of the Reck basement, the police gave up their search for the murder weapon. The most important piece of evidence to corroborate the challenged confessions was, henceforth, not sought by the authorities. They continued, however, to seek a confession.

At 3:00 P.M., Saturday, the First Assistant State's Attorney of Cook County, Mr. Wilbert Crowley, took up the interrogation of Emil Reck.[205] Reck had been in police custody for 76 hours, but this was the first time Crowley had seen him.[206] Crowley did not interview Reck privately. Police

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[198] Ex. 2, p. 935 (Officer Reilly, State's Witness).

[199] Ex. 2, p. 932 (Officer Reilly, State's Witness).

[200] Ex. 2, p. 935 (Officer Reilly, State's Witness).

[201] Ex. 2, p. 405 (Reck).

[202] Ex. 2, p. 1030 (Captain O'Connell, State's Witness).

[203] Ex. 2, p. 1030 (Captain O'Connell, State's Witness).

[204] Ex. 2, p. 1030 (Captain O'Connell, State's Witness).

[205] Ex. 2, p. 226/4 (Crowley, State's Witness).

[206] Ex. 2, p. 226/4 (Crowley, State's Witness).

Captains O'Connell and Horan were present from the beginning of the session.[207] Also present were Assistant State's Attorneys Blair Varnes and Marshall Kearney.[208] Later, Chief of Detectives John Sullivan joined the crew of interrogators.[209]

Crowley launched directly into questioning Reck about the Peacock case. He did not warn Reck that his answers might be used against him and did not inform Reck of his right to counsel or of any other of his constitutional rights.[210]

Reck denied any connection with the Peacock murder and any knowledge concerning it.[211] The interrogation then turned to "other matters."[212]

After about 15 minutes, Prosecutor Crowley returned to the Peacock murder.[213] Reck still denied participating in the murder but admitted that Goethe had told him about it.[214]

Finally, at some point between 4:00 and 4:30 P.M., after more than an hour of insistent questioning by Crowley, Reck was taken into Prosecutor Kearney's office.[215] There he was confronted by Durland Nash, Robert Goethe, Officer Reilly, Prosecutor Varnes, Prosecutor Kearney, Prosecutor Crowley, Chief of Detectives Sullivan, Captain Horan, Captain

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[207] Ex. 2, p. 226/4 (Crowley, State's Witness).

[208] Ex. 2, p. 226/4 (Crowley, State's Witness).

[209] Ex. 2, p. 332 (Chief Sullivan, State's Witness).

[210] Although his testimony was very detailed, Crowley never stated that he had informed Reck of his rights. See Ex. 2, pp. 226/5-226/12 (*passim.*) (Crowley, State's Witness).

[211] Ex. 2, p. 226/5 (Crowley, State's Witness).

[212] Ex. 2, p. 226/5 (Crowley, State's Witness).

[213] Ex. 2, p. 226/5 (Crowley, State's Witness).

[214] Ex. 2, p. 226/5-6 (Crowley, State's Witness).

[215] Ex. 2, p. 332 (Chief Sullivan, State's Witness).

O'Connell, and a few other police officers.[216] After Reck, Crowley, and their coterie of police officers entered Prosecutor Kearney's office, Durland Nash was instructed by Crowley to "tell Reck what you have told us about the Peacock case."[217] Nash then told the story which, with embellishments, became his signed confession to the Peacock murder.[218] When Nash finished his account, Reck again denied participation in the crime.[219]

Crowley then turned to Robert Goethe and secured from him a statement that Nash was telling the truth and that Reck had participated in killing Dr. Peacock.[220] Goethe then urged Reck to confess. At this juncture, Reck apparently stated that he had been present when Dr. Peacock was killed but had not struck Peacock in accordance with the story told by Nash and adopted by Goethe.[221] When further pressed by Crowley, Reck stated that Michael Livingston, and not he, had been the one who clubbed Dr. Peacock.[222] The questioning was stopped as Crowley ordered that Livingston be brought into the room.[223] Reck was now confronted not only with a roomful of police and prosecutors but also with the three other boys who had already confessed. Prosecutor Crowley abruptly left the room announcing he had an appointment.[224]

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[216] Ex. 2, p. 226/8 (Crowley, State's Witness).

[217] Ex. 2, p. 226/9 (Crowley, State's Witness).

[218] Ex. 2, p. 226/9-10 (Crowley, State's Witness).

[219] Ex. 2, p. 226/10 (Crowley, State's Witness).

[220] Ex. 2, p. 226/10 (Crowley, State's Witness).

[221] Ex. 2, p. 226/11 (Crowley, State's Witness).

[222] Ex. 2, p. 226/11 (Crowley, State's Witness).

[223] Ex. 2, p. 226/12 (Crowley, State's Witness).

[224] Ex. 2, p. 226/12 (Crowley, State's Witness); Ex. 2, p. 333 (Chief Sullivan, State's Witness).

Livingston immediately accused Reck of having been the one who struck Dr. Peacock with a club.[225] A great deal of conversation followed this accusation, but the only prosecution witness who testified concerning this particular period could not remember any of it.[226] Finally, according to the Chief of Detectives Sullivan, Reck said "Well, I might as well tell I was there." [227]

The police and prosecutors made immediate arrangements for a stenographically recorded joint statement to be taken.[228] The joint statement commenced at 5:55 P.M. on Saturday, March 28th.[229] Reck, Nash, Goethe, Livingston, Prosecutor Kearney, Prosecutor Varnes, Chief of Detectives Sullivan, Captain O'Connell, Captain Horan, Lieutenant Kelley and the ubiquitous Officer Reilly assembled in an office at the State's Attorney's headquarters for the event.[230] A shorthand reporter employed by the State's Attorney's office, Isaacson, was present to record the proceedings.[231]

Isaacson testified that when he saw Reck on Saturday at the joint confession, "I could see he was sick . . . his face was ashen color, and he did not look well, just sick." [232] Reck was "very pale";[233] his face was "white and sick

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[225] Ex. 2, p. 333 (Chief Sullivan, State's Witness).

[226] Ex. 2, p. 334 (Chief Sullivan, State's Witness).

[227] Ex. 2, p. 334 (Chief Sullivan, State's Witness).

[228] Ex. 2, p. 334 (Chief Sullivan, State's Witness).

[229] Ex. 1, p. 587 (Isaacson, State's Witness).

[230] Ex. 1, p. 586 (Isaacson, State's Witness).

[231] Ex. 1, p. 585 (Isaacson, State's Witness).

[232] Ex. 1, pp. 590, 591 (Isaacson, State's Witness).

[233] Ex. 1, p. 593 (Isaacson, State's Witness).

looking."[234] He "walked weakly."[235] At this point Reck had been in custody almost 80 hours without counsel, without contact with his family, without a court appearance and without charge or bail.

Chief of Detectives John L. Sullivan aptly described the procedure followed in the taking of the so-called "joint confession":

> Chief Sullivan: Nash did most of the talking, as I remember, and the others acquiesced with what he said.
>
> Q. And by "acquiesced," just what do you mean? A. They agreed that what he said was so.
>
> Q. And by agreed, do you mean Emil Reck said, "Yes, I agree, that is true"? A. Not in so many words.
>
> Q. What were the words he used, if you remember? A. Why, the acquiescence, I think was, Mr. Kearney now and then would say, "Is that right, Livingston?" and Livingston would say, "Yes"; and he would say, "Is that right, Reck?" and Reck would say, "Yes" . . .[236]

The text of the "joint confession" conclusively verified Chief Sullivan's recollection on this point. The extent to which Reck volunteered information in the course of the ceremony can be best assessed by setting forth, *verbatim*, Reck's answers. After identifying themselves and being

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[234] Ex. 1, p. 594 (Isaacson, State's Witness).

[235] Ex. 1, p. 593 (Isaacson, State's Witness).
This testimony about Reck's physical appearance was given by Isaacson outside the presence of the murder trial jury, during the hearing on Reck's motion to suppress the confessions. Six days later, after Reck's motion to suppress had been denied, Isaacson testified in the presence of the jury. This time Isaacson did an astonishing about-face and denied that he had ever seen Reck looking ill. See Ex. 2, pp. 226/149-151 (Isaacson, State's Witness).

[236] Ex. 2, p. 335 (Chief Sullivan, State's Witness).

formally cautioned, the boys were asked if they remembered the "incident" involving Dr. Peacock. Reck's responses, without the questions and responses of the other boys, follow:

> Emil Reck: "Do I know the case? . . . Pretty good. . . . I am. . . . Yes.[237] . . . Yes, sir. . . . Yes, sir. . . .[238] No. . . . Yes. . . . Yes, sir. . . ." [239]

(Three pages of questions and answers here intervene, Reck remaining silent throughout.)[240]

> "I went home and ate. . . . How far? . . . Three blocks. . . . Yes. . . . Yes . . . Yes. . . . I went with them. . . . Yes. . . . Yes. . . ." [241]

(One page intervenes, Reck remaining silent.)[241a]

> "Yes, sir. . . .[242] Yes, sir. . . ." [243]

(Three pages intervene, Reck remaining silent.)[244]

> "I was across the street. . . . No. . . .[245] . . . Yes. . . ." [246]

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[237] p. 282 (Citations in notes 237 to 271 are all to Exhibit 2 of the Record).

[238] p. 283.

[239] p. 284.

[240] pp. 285-87.

[241] p. 288.

[241a] p. 289.

[242] p. 290.

[243] p. 291.

[244] pp. 293-94.

[245] p. 294.

[246] p. 295.

(One and one-half pages intervene, Reck remaining silent.)[247]

". . . . Yes." [248]

(One page intervenes, Reck remaining silent.)[249]

". . . Yes. . . . Back seat. . . .[250] . . . I did not have any weapon. . . . No. I do not see where they say I had a weapon. . . . A club. . . . A club, a wooden one. . . . About fourteen inches. . . . It was just straight. Straight, you know, like a broom handle, from a broom, straight. . . . You know wide, as round as a broom handle. . . . Back pocket. . . . " [251]

(Two and three-quarter pages intervene, Reck remaining silent.)[252]

"I do not know, all I know I sat in the back. . . . Yes. . . . Yes. . . . " [253]

(One and three-quarter pages intervene, Reck remaining silent.)[254]

". . . Sitting in the seat. . . . " [255]

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[247] pp. 295-96.

[248] p. 296.

[249] p. 297.

[250] p. 298.

[251] p. 299.

[252] pp. 300-302.

[253] p. 302.

[254] p. 303.

[255] p. 304.

(One and one-half pages intervene, Reck remaining silent.)[256]

". . . Calling him names? . . . I am not sure of calling him names. . . .[257] . . . I was behind him. . . . Yes. . . .[258] . . . Yes. . . . Yes.[259] I don't remember hitting him. . . . He was dead. . . .[260] . . . He was dead. . . . Once. . . . Once. . . . Yes. . . .[261] . . . Yes.[262] . . . Yes. . . . Yes. . . . Yes, I said. . . . The back. . . .[263] . . . Yes. . . . I threw it on the seat and half of it got on the Doctor. . . . Yes. . . . Yes. . . . On his shoulder. . . .[264] . . . Yes. . . . I looked in it and left it there. . . . Nothing. . . . No, it was not empty, but I just looked at it. I did not want to take nothing out. . . . No, nothing but a knife. . . . I threw it away. . . . I cannot remember. Just picked it up and looked at it and threw it away. . . .[265] Yes. . . . Into the car he was driving. . . .[266] . . . In the back door. . . . Yes. . . . Next to the street. . . . I think I did. . . . Grip? I must have stumbled and threw it over like in the front. . . . Yes. . . . Yes. . . .[267] I think two or three pockets. . . . Twenty. . . . Yes. . . . Five. . . . Yes, sir, five dollars. . . ."[268]

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[256] pp. 304-306.
[257] p. 306.
[258] p. 307.
[259] p. 308.
[260] p. 309.
[261] p. 310.
[262] p. 311.
[263] p. 312.
[264] p. 313.
[265] p. 314.
[266] p. 315.
[267] p. 316.
[268] p. 317.

(Two pages intervene; Reck is silent.)[269]

"Yes. . . . Yes, sir. . . ."[270] . . . Yes. . . ."[271]

It should be also noted that at the key points in this "confession" Reck made mistakes and was then led into correcting himself. For example, Reck first stated that he had no weapon at the time of the Peacock killing. His interrogator then suggested to him that he had had a club, and Reck fell in with the suggestion.[272] Reck also stated initially that he did not recall hitting Dr. Peacock.[273] But, after a highly suggestive colloquy between the interrogator and Nash, and two unresponsive answers by Reck, the question was finally answered to the interrogator's satisfaction.[274]

Not a single question was asked concerning the disposition of the revolver which, according to the confession, had been used to shoot Dr. Peacock. No hint as to its whereabouts was requested of or volunteered by Reck who, according to Goethe, last had the gun.[275] It should be noted also that Prosecutor Crowley, in recounting his interrogation of Emil Reck earlier on Saturday afternoon, was able to recall, almost word-for-word, every single statement of Emil Reck except one:

"When we concluded, Captain O'Connell I guess then asked him what he did with the gun; and I don't know

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[269] pp. 318-19.

[270] p. 320.

[271] p. 321.

[272] Ex. 2, p. 299 (Joint Confession).

[273] Ex. 2, p. 309 (Joint Confession).

[274] Ex. 2, pp. 309-10 (Joint Confession).

[275] Ex. 2, p. 277 (People's Exhibit 8, Goethe's Confession).

what he told, whether he answered that question, but I couldn't tell you just what his answer was at that particular time. I know he told me something about the gun. . . ." [276]

The State was not only unable to find the elusive pistol; it was also beginning to forget all about it.

The interrogation also shied away from the automobile which was necessary to transport the four boys from their neighborhood to the scene of the murder and back. None of the four boys acknowledged ownership of the vehicle. No one confessed stealing it. The police apparently made no effort to find it. The car conveniently materialized at the beginning of the alleged trip across the City of Chicago and vanished at the end.

It took two hours to complete taking the joint confession.[277] The State's Attorney's court reporter then left to transcribe his stenographic notes.[278] After transcription, the joint confession was taken to Prosecutor Crowley who, late on Saturday night, March 28th, had it signed by the boys.[279] Captain O'Connell, Officer Susenbeck, Chief Sullivan, Captain Horan, Prosecutor Kearney, and Officer Reilly were also present.[280]

The record is silent as to the further activities of the boys on Saturday night or early Sunday morning. We do not know whether they were permitted to sleep or whether they were subjected to further interrogation and show-ups. Reck himself was unable to give any coherent account of

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[276] Ex. 2, pp. 226/7-8 (Crowley, State's Witness).

[277] Ex. 2, pp. 226/43 (Crowley, State's Witness).

[278] Ex. 2, pp. 226/144 (Isaacson, State's Witness).

[279] Ex. 1, p. 961 (Crowley, State's Witness).

[280] Ex. 2, p. 986 (Officer Susenbeck, State's Witness).

what happened on Saturday night or Sunday morning,[281] and the State volunteered no information concerning this period. It does appear, however, that at some point on Sunday morning Reck was back in the by-now familiar handball court at the North Avenue Station.[282]

The Fifth Day:

On Sunday, March 29th, Reck was interrogated in the State's Attorney's offices. The questioning was conducted by Assistant State's Attorneys,[283] but Captain O'Connell spent part of Sunday afternoon and evening with Reck, also.[284]

At 3:05 P.M., an individual statement was being taken from Livingston.[285] At 4:10 P.M. it was Reck's turn and Prosecutors Kearney and Varnes began taking his individual statement. Sergeant Albert Bruns from the North Avenue Station was present.[286] This confession was merely a reiteration of the joint statement. Again, nothing whatsoever was asked concerning either the pistol or the car.

Reck's individual confession was completed at 4:40 P.M.[287] He had now been in police custody for 102 hours.

While the individual confessions were being transcribed, Crowley made telephone calls to several ex-grand jurors and to members of the "doctor's committee." Crowley in-

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[281] See, for example, Ex. 1, p. 689; Ex. 2, pp. 408, 415, 416 (Reck).

[282] Ex. 2, p. 392 (Reck).

[283] Ex. 2, p. 953 (Officer Reilly, State's Witness).

[284] Ex. 1, p. 940 (Capt. O'Connell, State's Witness).

[285] Ex. 2, p. 243 (People's Exhibit 6).

[286] Ex. 2, p. 226/123 (Harvey, State's Witness).

[287] Ex. 2, p. 226/32 (Crowley, State's Witness).

vited these men to be present for a signature ceremony Sunday night.[288]

As each of the four boys finished his individual statement on Sunday afternoon, Crowley had him escorted to the County Jail so that he could be cleaned up and given fresh clothes for the impending ritual.[289] Thus, when the civilian witnesses, who were previously briefed by Crowley,[290] later observed the youthful prisoners on Sunday night, they remarked that the boys seemed well cared for, were clean, and had clean clothes.[291]

The four prisoners were led into Captain Dan Gilbert's office. Three prosecutors, two police captains, one police lieutenant, the Chief of Detectives and several other detectives, as well as the stenographer, confronted them.[292] Also present but seated along the wall at the boys' rear were approximately 12 civilians.[293] The individual statements were read to the boys; they were cautioned; and the confessions were signed.[294]

At the beginning of the ceremony, the boys were introduced to the police officers and state's attorneys present but not to the civilians behind them.[295] Everyone was wearing civilian clothes, and there was nothing to distinguish the civilians from the police.[296] The boys were not in-

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[288] Ex. 2, p. 226/16 (Crowley, State's Witness).

[289] Ex. 2, p. 226/16 (Crowley, State's Witness).

[290] Ex. 2, p. 226/18 (Crowley, State's Witness).

[291] Ex. 2, p. 226/85 (Landon, State's Witness); Ex. 2, p. 226/68 (Munnecke, State's Witness).

[292] Ex. 2, p. 226/24-25 (Crowley, State's Witness).

[293] Ex. 2, pp. 226/18, 24-25 (Crowley, State's Witness).

[294] Ex. 1, pp. 556, 558-59 (Harvey, State's Witness).

[295] Ex. 1, p. 577 (Harvey, State's Witness).

[296] Ex. 2, p. 226/26-29 (Crowley, State's Witness).

formed that there were any civilians in the room.[297] They had no conversation with them.[298] No one asked them whether they had been beaten.[299] No member of their families was present, nor was counsel for any of the prisoners there. Reck's father had gone to the building on Sunday, but he was not permitted to see his son.[300]

At the time he signed the second confession Reck had been a prisoner for approximately 105 hours.

At the time Reck signed the second confession, he had been without solid food for at least 48 hours. The last solid food given Reck was an egg sandwich on Friday at the North Avenue Station.[301] This must have occurred prior to 7:00 P.M. on Friday because from that time until Reck's second trip to Cook County Hospital, almost every moment is accounted for and there is no mention of food. When Reck was taken to the hospital on Friday night, the doctors prescribed a milk diet for him.[302] Reck was still on his milk diet on Sunday afternoon.[303] He was still on his milk diet after the signature ritual was completed on Sunday night.[304]

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[297] Ex. 2, pp. 226/26-29 (Crowley, State's Witness).

[298] Ex. 2, p. 226/133 (Harvey, State's Witness).

[299] Ex. 2, p. 226/81 (Munnecke, State's Witness).

[300] Ex. 2, p. 742 (Charles Reck, Defense Witness). Crowley corroborated Charles Reck's testimony of being in the building on Sunday but could not recall whether Charles Reck was permitted to see his son. Ex. 1, p. 351 (Crowley, State's Witness).

[301] Ex. 2, p. 973 (Officer Kula, State's Witness).

[302] Ex. 2, p. 226/30 (Crowley, State's Witness); Ex. 1, p. 812 (Livingston, Defense Witness).

[303] Ex. 2, pp. 226/30, /35, /37 (Crowley, State's Witness); Ex. 2, p. 718 (Dr. Day, Defense Witness); Ex. 1, p. 576 (Harvey, State's Witness).

[304] Ex. 1, p. 576 (Harvey, State's Witness); Ex. 2, p. 718 (Dr. Day, Defense Witness).

There is not one word of testimony in the voluminous record which discloses that Reck had so much as one ounce of solid food during this 48-hour period.

The Sixth, Seventh and Eighth Days:

There is nothing in the record concerning Monday, Tuesday and Wednesday, March 30th through April 1st, except that we know that Reck was still in custody. The State never introduced evidence justifying or explaining its decision to hold Reck without preliminary hearing for three days after he had "voluntarily" confessed to a murder. Reck was taken on a re-enactment of the crime on the Monday night after the signature ceremony.[305] Curiously, the State did not disclose whether or not Reck played his role well.

The Ninth Day:

Reck was not brought before a magistrate prior to Thursday, April 2nd.[306] He had been in police custody at least eight full days. He had not seen his father, any of his other relatives, or any lawyer (except, of course, prosecuting attorneys) during this period.[307]

Postscript:

Shortly after his admission to County Jail after arraignment, Reck was treated for "kidney trouble" at the Northwestern University Clinic.[308]

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[305] Ex. 1, pp. 407, 416 (Sgt. Aitken, State's Witness). The other three boys participated in a "partial" re-enactment at 4:00 A.M., Saturday (Ex. 2, p. 226/40, Crowley, State's Witness), approximately 12 hours before they outlined Reck's role to him to induce his participation in a joint confession.

[306] Ex. 1, p. 280 (Reck).

[307] Ex. 1, p. 280 (Reck).

[308] Ex. 1, p. 30 (Behavior Clinic Report).

At his trial, Reck was still sick and had to be temporarily excused from the stand and examined by a doctor.[309]

After his conviction, Reck was operated upon for a double hernia at the Menard Penitentiary, November 6, 1937.[310] He had sustained no injuries and had been in no accidents between the time of his second hospitalization on March 27, 1936, and the date of his operation.[311] No explanation of this operation was attempted by the State in the post-conviction hearing.

Controverted evidence of physical brutality inflicted by police officers upon Emil Reck:

Reck testified at length to beatings inflicted upon him in the North Avenue Police Station on Wednesday,[312] Thursday,[313] Friday,[314] and Saturday[315] by Reilly,[316] Susenbeck,[317] Kula,[318] Captain O'Connell,[319] and other police officers.[320] Reck was battered by blows to his stomach and subjected

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[309] Ex. 1, pp. 661-62.

[310] Ex. 1, pp. 281-83 (Reck).

[311] p. 283 (Citations in note 311 through 320 are to Reck's testimony in Exhibit 1 of the Record).

[312] pp. 619-52.

[313] pp. 661-66, 673.

[314] pp. 675-76.

[315] p. 684.

[316] pp. 624, 627, 641, 644.

[317] pp. 260, 639, 650, 656.

[318] pp. 638, 642, 645.

[319] pp. 662-63, 684.

[320] p. 676. These officers were apparently Aitken, Donovan, McShane (see text at notes 105-07, above) Youhn and/or Larke (see text at notes 134-35, above).

to various other tortures and beatings. His testimony, although naively phrased, is replete with vivid circumstantial detail as to the techniques of police brutality employed.

Michael Livingston confirmed Reck's story of physical violence. He saw Officer Susenbeck attack Reck on Wednesday.[321] Livingston didn't see Reck again until Saturday afternoon at the State's Attorney's office and thus could not testify to the beatings of Thursday, Friday and Saturday morning.[322]

Robert Goethe and Durland Nash—both of whom had already been sentenced after a plea of guilty to the Peacock murder and were brought back from the penitentiary to testify[323]—also corroborated Reck's account of the police tortures inflicted upon him.

Goethe testified that on Wednesday afternoon he saw police officers lead Reck into the back room at the North Avenue Station and that shortly afterwards he heard Reck screaming "Please don't do it." Goethe heard Reck screaming for some five minutes. Then there was silence for a moment followed by more screams. When Reck was escorted from the back room a little later, Goethe noted that Reck looked like he had been crying.[324]

Nash testified that, at one point during Reck's ordeal, he saw Reck being taken by the police into this same back room. He heard Reck cry "Don't Don't Don't" repeatedly over a ten-minute period. He heard noises that "sounded like somebody was getting slapped in the face." Then

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[321] Ex. 1, pp. 803-04 (Livingston, Defense Witness).

[322] Ex. 1, p. 805 (Livingston, Defense Witness).

[323] Ex. 1, pp. 882, 901 (Stipulations).

[324] Ex. 1, pp. 865-71 (Goethe, Defense Witness).

Nash heard the sound of someone moaning. When the door was opened, Nash saw Reck "pass out." [325]

Of course, all the police denied beating Reck.[326]

Summary of Argument

Petitioner's confessions were the product of coercion—mental and physical—and their use against him at his trial violated his rights under the due process clause of the Fourteenth Amendment.

I.

Mental or psychological coercion is established by the uncontroverted facts in the Record. That Petitioner was subjected to overwhelmingly coercive police pressures designed to elicit a confession is demonstrated by the circumstances of Petitioner's long secret detention, subjection to relentless interrogation, and isolation from friends, family and counsel, his violent illness, vomiting of blood, emergency hospitalization, and inadequate diet. The circumstances of Petitioner's youth, ignorance, limited education, low intelligence, and lack of experience with the police or courts demonstrate that Petitioner's capacity for resistance to police pressures was slight or non-existent. When these circumstances of pressure are weighed against Petitioner's powers of resistance, it becomes clear that Petitioner's will was overborne and his confessions were coerced.

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[325] Ex. 1, pp. 887-90 (Nash, Defense Witness).

[326] Ex. 1, pp. 290-92, 905-08 (Reilly); Ex. 1, pp. 921-23 (Kula); Ex. 1, pp. 927-31 (Susenbeck); Ex. 1, pp. 932-34 (O'Connell); Ex. 1, p. 407 (Aitken); Ex. 2, p. 1009 (Youhn). Although officers Donovan, McShane and Larke were present when Reck was allegedly beaten (see note 320, above), they were never called by the State to deny the beatings.

II.

Physical coercion is established by the uncontroverted facts of Petitioner's physical condition, by his detailed, consistent and corroborated account of police brutality, and by the failure of the State otherwise to explain his complete physical collapse while in police custody.

III.

The Court of Appeals majority ignored the six applicable decisions of this Court. It relied upon three other decisions which are clearly inapposite because they involved defendants who were far stronger and subjected to far less pressure than Petitioner. The Court of Appeals majority ignored or distorted the crucial evidentiary facts establishing psychological and physical coercion.

IV.

The District Court erred in its holding that the coerced confession decisions of this Court were intended to be applied only prospectively, in considering the irrelevant factors of Reck's assumed guilt and his assumed status as a menace to society, and in ignoring the absence of any credible evidence in the record tending to establish these "facts."

ARGUMENT

If either of the two confessions introduced in evidence against Emil Reck at his murder trial were coerced, then the Fourteenth Amendment requires that his conviction be set aside, regardless of the sufficiency of other evidence, if any, to sustain the conviction. *Malinski* v. *New York*, 324 U.S. 401, 404 (1945); *Payne* v. *Arkansas*, 356 U.S. 560, 568 (1958).

I.

Emil Reck's Confessions Were the Product of Psychological Coercion.

In determining whether a confession is the product of psychological coercion and thus invalidated by the due process clause, this Court has traditionally weighed "the circumstances of pressure against the power of resistance of the person confessing." *Fikes* v. *Alabama*, 352 U.S. 191, 197 (1957). The following six decisions of this Court compel the conclusion that Reck's confessions were the product of psychological coercion:

Blackburn v. *Alabama*, 361 U.S. 199 (1960);
Spano v. *New York*, 360 U.S. 315 (1959);
Fikes v. *Alabama*, 352 U.S. 191 (1957);
Turner v. *Pennsylvania*, 338 U.S. 62 (1949);
Watts v. *Indiana*, 338 U.S. 49 (1949);
Haley v. *Ohio*, 332 U.S. 596 (1948).

This conclusion follows from the fact that (1) Reck was at least as susceptible to coercive police pressures as any of the defendants in the six cited cases except *Blackburn*; and (2) the pressures exerted upon Reck by his captors were at least as coercive as those endured by the defendants in all six cited cases.

(1) "... *The power of resistance of the person confessing.*"

The 19-year-old Reck, with no previous arrests and the intelligence of a child of ten, was more vulnerable to police coercion than the 26-year-old longshoreman in *Turner* (See No. 107, O.T. 1948, Record p. 111a) who had been characterized by the trial judge not as a person with a "low degree of intelligence" but as a "smart, clever individual." (No. 107, O.T. 1948, Record p. 276.) Similarly, Reck was more vulnerable than the 27-year-old "thick-headed" ex-convict involved in the *Fikes* case (352 U.S. at 193), or the ex-convict, Navy veteran, truck driver who was the defendant in *Watts*. (See No. 610, O.T. 1948, Respondent's Brief, pp. 18, 25, 39.) Surely Reck, a "weakling" who cried "pretty easily" (Ex. 1, pp. 27, 882), did not have the "power of resistance" of the defendant in *Spano*, who, although undoubtedly dull and "emotionally unstable" (360 U.S. at 322 n. 3), was still strong and bold enough to fight a professional boxer. 360 U.S. at 316. Even the 15-year-old defendant in *Haley* appears to have been some years ahead of Reck in mental age: Reck was 16 when he dropped out of the seventh grade (Ex. 1, p. 15); Haley was a senior in high school at age 15. 332 U.S. at 608.

(2) "... *The circumstances of pressure....*"

Reck's eight-day ordeal at the hands of the police was more exhausting than anything suffered by the defendants in *Fikes*, *Watts*, *Turner*, *Haley*, *Spano* or *Blackburn*. The eighty-hour secret detention of Emil Reck which preceded his first confession was more than fifteen times as long as the detention of Haley; it was ten times the length of Spano's pre-confession imprisonment and at least nine times as long as the detention in *Blackburn*. Although Reck's pre-confession detention was shorter than those involved in

Fikes, Watts, and *Turner,* it must be noted that in none of those cases did the defendant suffer anything remotely approaching Reck's physical collapse on the third night of his interrogation.

The shocking character of the police treatment of Emil Reck is highlighted when it is compared with the relatively gentle ministrations of the New York police condemned in *Spano.* Vincent Spano had consulted with and been advised by counsel prior to his interrogation and was brought before a judge within 15 minutes of the time that the first court with appropriate jurisdiction was open after his arrest. After only eight hours of detention and some cajolery by a policeman friend, Spano confessed. Spano, unlike Reck, never fainted, hemorrhaged, or vomited blood; he was never carried to a hospital in a stretcher or returned to the police in a wheel chair. Spano was not "white and sick looking" (See text at note 234, *supra*) when he confessed, and his condition did not require a special milk diet. No drugs had been injected into Spano's body. He had not been grilled about "every crime that was committed in the District." (See text at notes 61-63, *supra.*) Yet this Court held that the use by the State of Spano's confession violated the due process clause because his "will was overborne by official pressure, fatigue and sympathy falsely aroused . . ." *Spano* v. *New York,* 360 U.S. at 323.

During the 24 hours preceding his first confession and the 48 hours preceding his second, Reck received no solid food whatsoever. Of the six cases in point, only *Watts* reveals a defendant weakened by hunger. 338 U.S. at 53. Spano, who was held by the police for only 15 hours, received, after four hours, a meal which consisted of nearly as much food as Reck received in four days. 360 U.S. at 318.

In *Watts,* as here, the defendant was first conditioned by police pressures and then turned over to an experienced

prosecutor, to whom he finally capitulated and confessed. 338 U.S. at 53. Spano was treated more gently than Reck or Watts but, like them, ultimately made his coerced confession to a prosecutor with whom he had initially refused to cooperate. See 360 U.S. at 317-19.

In *Spano* the police secured their confession and ceased to badger the defendant. Emil Reck was not so fortunate. Within hours of his first confession Reck was back in the handball court at the North Avenue Station. Later, "Reck was again interrogated at the State's Attorney's office. . . ." (R. 30; Petition for Certiorari, Appendix C, p. 17; 172 F. Supp. at 738.) A second confession was obtained from Reck and signed Sunday night, 102 hours after his imprisonment began. Even this was not the end. Reck was held incommunicado for four more days before he was brought to court on the ninth day of his detention.

Such additional post-confession detention should in this case, as it did in *Haley* v. *Ohio*, lead a federal court to "take with a grain of salt" the "present apologia" of the police that the interrogation was conducted in a "fair and dispassionate manner." 332 U.S. at 600. The acts of the police in repeatedly turning Reck's father away from his injured son's hospital door and police station cell show, as in *Haley*, "such a callous attitude of the police towards the safeguards which respect for ordinary human relationships compels" that this Court should again be "darkly suspicious" of what went on behind the closed doors which barred all disinterested outsiders. 332 U.S. at 600.

II.

Emil Reck's Confessions Were the Product of Physical Coercion.

Emil Reck's confessions were coerced not only by the "sophisticated" methods described in *Spano*, 360 U.S. at 321, but also by the tactics of physical brutality outlawed in *Brown* v. *Mississippi*, 297 U.S. 278 (1936). Although the District Court evaded making a specific finding on the issue of physical brutality, it recognized the force of the evidence on this issue when, after summarizing the undisputed facts, it stated that this evidence "carries an unexpressed import of police brutality, which brutality, unfortunately, does exist in our society" (R. 31; Petition for Certiorari, Appendix C, p. 18; 172 F. Supp. at 738). The District Court went on to note that Reck's "testimony of police brutality" was corroborated by additional direct testimony and circumstantial evidence (R. 42; Petition for Certiorari, Appendix C, p. 26; 172 F. Supp. at 742). Further, the District Court aptly pointed out that the police denials of brutality were entitled to little, if any weight, saying:

> "*If there had been brutality, the police would not be quick to admit it since then not only would the confession have been barred but the police would also have been guilty of a felony*" (R. 47; Petition for Certiorari, Appendix C, p. 29; 172 F. Supp. at 743).

The medical testimony in the record supplies convincing proof that Reck was beaten by the police. At the trial, doctors testified that Reck's hemorrhaging, vomiting, fainting and pain could have been caused by beating (R. 48; Petition for Certiorari, Appendix C, p. 30; 172 F. Supp. at 744). Another doctor, *testifying for the State*, stated that he saw Reck in the police station "exposed," with his pants

open at the waist, his shirt open and hanging down outside his pants, his hand rubbing his abdomen and, later, a pool of bright red blood on the floor (R. 8, 42; Petition for Certiorari, Appendix C, pp. 15-16, 26; 172 F. Supp. at 737, 742). The District Court observed that:

> "At 9:00 A.M. on Saturday, Reck told Dr. Zachary Felsher of the Cook County Hospital that the police had been beating him in the stomach. He also told Dr. Weissman of the same hospital that he had been beaten in the abdomen and chest over a three-day period. This was the first time since his arrest some 70 hours before that Reck had conversed with any civilian outside the presence of police officers" (R. 28; Petition for Certiorari, Appendix C, p. 16; 172 F. Supp. at 737).

This testimony was given by two physicians who were employees of the County of Cook at the time they examined Reck and testified in court (Dr. Felsher, Ex. 2, pp. 551-52, 556-57, Ex. 1, pp. 735-36; Dr. Weissman, Ex. 2, pp. 526, 541). Their testimony is verified by the official hospital record prepared contemporaneously with Reck's physical examination, which was introduced into evidence and vouched for by the prosecution (Ex. 2, p. 1004). These repeated accounts of police torture were given by Reck to the two physicians nine hours before Reck made his first confession. They were made six days before Reck was permitted any contact with his family, friends, or attorney. They were made by a prisoner with the intelligence of a ten-year-old child who could not have known that he was going to confess nine hours later and can hardly be assumed to have understood in advance the possible legal consequences of his charges of brutality.

Reck's account of his torture by the police was corroborated not only by his co-defendant Livingston but also by

Nash and Goethe, who had no motive to lie on Reck's behalf. They had already been sentenced for the Peacock killing. If they had any motive to lie, it would have been to lie on behalf of the prosecution in hopes of achieving a reduction of sentence. Cf. *Napue* v. *Illinois*, 360 U.S. 264, 266 (1959). Yet, both Nash and Goethe testified that Reck had been beaten, that his cries for mercy had been followed by sounds of blows and moans, and that soon afterward he fainted. (See text at notes 323-25, *supra*.)

The admitted facts and the circumstantial evidence supporting Reck's compelling story of brutality are so strong that the State has never been able to produce a plausible contrary explanation of why Reck suffered such severe physical reactions to police hospitality.[327] Given the State's total failure to explain the evidence, there is no reasonable basis for any conclusion except that Reck was the victim of violent beatings administered by the police for the purpose of coercing his confessions. Therefore, the State's use of Reck's confessions at his trial violated the due process clause of the Fourteenth Amendment. *Brown* v. *Mississippi*, 297 U.S. 278 (1936).

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[327] One police officer, Sergeant Aitken, claimed he heard Dr. Abraham say that Reck had a "nerve reaction." (Ex. 2, p. 226/166). Dr. Abraham, however, took the witness stand twice at the trial and never testified that Reck had a "nerve reaction." (Ex. 1, pp. 948-55, Ex. 2, pp. 501-507). Of course, there is no explanation by the State as to how a "nerve reaction" could have caused the "foot square" puddle of Reck's "bright red" blood on the floor of the handball court in the police station. Nor does the State explain how Sergeant Aitken could solemnly deny, during the 1936 trial, that he had seen Reck vomit blood (Ex. 2, pp. 226/175-76) but vividly describe, during the 1952 post-conviction hearing, that he had seen Reck hemorrhaging (Ex. 1, pp. 405, 412-13) while claiming that he had given "exactly the same testimony" in 1936. (Ex. 1, p. 407).

III.

The Majority Opinion of the Court of Appeals Below Misapprehends the Undisputed Facts in the Record, and Misconceives the Meaning of This Court's Prior Decisions Dealing With Coerced Confessions.

The majority opinion of the Court of Appeals below does not even mention, much less distinguish, the decisions of this Court which are in point, which were relied upon by Petitioner below, and which were cited as controlling by Judge Duffy in his dissenting opinion. See Petition for Certiorari, Appendix A, p. 9; 274 F.2d at 255. Instead, the majority below relied upon *Stein* v. *New York*, 346 U.S. 156 (1953); *Lisenba* v. *California*, 314 U.S. 219 (1941); and *Gallegos* v. *Nebraska*, 342 U.S. 55 (1951).

Unfortunately, the majority below fails to mention the facts which on their face distinguish *Stein*, *Lisenba* and *Gallegos* from this case. Thus, it overlooks the fact that the defendants in *Stein* were hardened criminals: "These men were not young, soft, ignorant or timid. They were not inexperienced in the ways of crime or its detection, nor were they dumb as to their rights." 346 U.S. at 185-86. The majority opinion also fails to note that the *Stein* defendants were subjected to only "twelve hours of intermittent questioning" (346 U.S. at 185), not four to five days, as was Reck. And, in relying upon *Lisenba*, the majority neglects to mention that the defendant there was "a man of intelligence and business experience," whose pre-confession interrogation lasted only twelve hours and whose first confession came in a public restaurant while he and his interrogators were smoking after-dinner cigars. 314 U.S. at 229, 232, 242. Finally, the Court of Appeals ignored the fact that no one contended that the confessions of Gallegos

"were in fact coerced or involuntary" and that the testimony in that case as to the circumstances of the interrogation of Gallegos was conspicuously "uncertain [in] character." 342 U.S. at 68, 71. Once the facts of *Stein*, *Lisenba*, and *Gallegos* are noted, the inapplicability of these cases becomes apparent and need not be labored.

Not only did the Court of Appeals majority ignore the facts in *Stein*, *Lisenba* and *Gallegos* but it also ignores and distorts the facts in the case at bar. Thus, the majority opinion erroneously implies that Reck became ill but once (rather than four times) the third day and was carried but once (rather than twice) to the hospital. It ignores the fact that Reck vomited blood and repeatedly fainted. It ignores the fact that Reck was a stretcher case on the third night. It never once mentions that Reck was being held *incommunicado* and that Reck's father tried repeatedly to see him but was turned away by the police. Nor does it mention Reck's sparse sandwich diet of the first three days or his milk diet of the fourth and fifth days. It fails to mention the crucial fact—*established by a prosecution witness who was an employee of the prosecutor's own office*—that Reck was still sick when he confessed Saturday night. Isaacson, the State's Attorney's court reporter who took the confession, testified: "I could see he was sick . . . his face was ashen color, and he did not look well, just sick . . . very pale . . . white and sick looking . . . He walked weakly" (Ex. 1, pp. 590, 591, 593, 594). Most incredibly of all, the majority accepts the hearsay statement of a police officer who must have lied either at Reck's trial or the post-conviction hearing (see note 327, *supra*) when it states that a doctor diagnosed Reck's complete physical collapse and hospitalization as a mere "nerve reaction." Petition for Certiorari, Appendix A, p. 5; 274 F.2d at 252.

The Court of Appeals majority seemingly adopts, as one of the grounds for its holding, the Illinois Supreme Court's

characterization of the Reck confessions as "complete, detailed and consistent." Petition for Certiorari, Appendix A, p. 3; 274 F.2d at 251. This characterization, even if warranted, would be irrelevant. *Watts* v. *Indiana*, 338 U.S. 49, 51 n. 2. But it is worth noting that the characterization is not even warranted. Scrutiny discloses that Reck's confessions are not trustworthy because they are neither "complete" nor "detailed" in the usually accepted sense of those terms.

First: The District Court recognized that Reck volunteered substantially no information about the Peacock murder during the course of the "joint confession" which took place on Saturday (R. 29; Petition for Certiorari, Appendix C, p. 17; 172 F. Supp. at 738). This confession consisted for the most part of "Yes" and "Yes, sir" responses to the leading questions of Reck's interrogators. For long periods during the "joint confession," Reck remained silent. And, as the District Court noted in its opinion, Reck's individual statement of the following day was simply "more or less a reiteration of the joint confession" (R. 30; Petition for Certiorari, Appendix C, p. 17; 172 F. Supp. at 738), so Reck had nothing new to learn.

Second: Both confessions are significantly devoid of any reference to the murder weapon with which Reck was allegedly entrusted. A State prosecutor, in stark contrast to his otherwise uncanny memory, was unable to remember Reck's response to interrogation about this gun (Ex. 2, p. 226/8). If Reck's confessions were voluntary, there would have been no reluctance on his part to reveal—and the State to check—the location of this one item of demonstrative evidence which might have verified the confessions.

The skilled prosecutors who conducted the formal confession proceedings in Reck's case possibly realized the

dangers of incorporating in Reck's confessions any references to the whereabouts of the murder gun. Since Reck's responses about the gun's location might subsequently be demonstrated as patently false, their whole case would have been in jeopardy if the subject were pursued. Hence, Reck's confessions were framed to omit the disposition of the murder gun.

Third: Similarly, the automobile which, according to the confessions, transported the accused across Chicago to the murder scene had to be ignored in convicting them. The confessions made no reference to the manner in which the car was obtained. The police made no effort to find it. No one admitted owning it. No one confessed to stealing it. The car disappeared at the end of the story as conveniently as it had materialized at the beginning. Had the time and means of obtaining and disposing of this vehicle been articulated in the confessions, of course, defense counsel would have been able to check the truth of the statements against the official records of stolen and recovered cars, or the records of purchase and sale of any dealer who might have been involved. But again, the prosecution apparently deemed the risk too great to run. Again, the risk was avoided by "forgetting" to inquire about the demonstrative evidence which would establish the credibility of the confession one way or another (R. 22, Petition for Certiorari, Appendix C, p. 12; 172 F. Supp. at 735; Ex. 1, pp. 1/25-/27).

Fourth: The 13 deep lacerations in Dr. Peacock's head have never been accounted for. Nothing in the confessions explains these lacerations. The alleged one blow by a club could not explain such wounds. Again, the record is silent.

The Court of Appeals, by refusing to discuss *Fikes, Watts, Turner, Haley* and *Spano,* by purporting to rely upon three decisions of this Court which are clearly in-

apposite, by ignoring half the uncontroverted facts and distorting the remainder, and by making unwarranted assumptions of irrelevant factors, has departed from the decisions of this Court.

IV.

The District Court's Theory That the Coerced Confession Decisions of This Court Were Limited to "Prospective" Application Is Not Justified by the Rationale or History of the Constitutional Law of Coerced Confessions.

The District Court acknowledged that this Court had held that the determination of whether or not a confession is the product of psychological coercion depends upon the "totality of circumstances" surrounding its extraction (R. 40-41, Petition for Certiorari, Appendix C, p. 25; 172 F. Supp. at 741). The District Court conceded that under the cases, Reck's confessions were coerced, saying: "Today, the Due Process Clause is violated" (R. 52; Petition for Certiorari, Appendix C, p. 33; 172 F. Supp. at 745). Yet, the District Court refused the relief which such a finding of a due process violation requires. Its explanation for its refusal was that, since there had been a change in the law of due process, it was not bound by the "totality of circumstances" test but was permitted—indeed, required—to view the "practical aspects" and not give Reck a new trial since this opportunity might result in the release of Reck, who might become a danger to society (R. 43-45, 54, 55, 59, 60; Petition for Certiorari, Appendix C, pp. 26-27, 34, 37; 172 F. Supp. at 742, 745-46, 747).

The District Court's conclusion is incorrect because (1) the law of due process has always condemned coerced confessions, whether the product of physical or mental coercion; and (2) the "practical" reasons cited by the District

Court for denying Emil Reck his constitutional rights find no support in the record and are irrelevant to the only legitimate issue in this case, *viz.* whether his confessions were coerced.

(1) *Coerced Confessions—occurring before or after 1936 or involving physical or mental coercion—have always been condemned by the Constitution of the United States.*

The basic premise of the District Court's ruling is its statement that the law of coerced confessions has changed since 1936:

"Reck was convicted of this crime in 1936 and at *that* time the Due Process Clause was not violated by the circumstances surrounding the making of his confession. Today, the Due Process Clause is violated" (R. 52; Petition for Certiorari, Appendix C, pp. 32-33; 172 F. Supp. at 745).

• • • • •

"When Reck was convicted in 1936, neither the Supreme Court of the United States nor society felt that his rights under the Due Process Clause had been violated. Today, the same circumstances would result in a violation of that Clause" (R. 54; Petition for Certiorari, Appendix C, p. 34; 172 F. Supp. at 745).

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"It is my opinion that social necessity requires re-evaluation of the Due Process Clause in Habeas Corpus cases wherein the petitioner has been imprisoned throughout an era in which the Clause has undergone a changing interpretation" (R. 53; Petition for Certiorari, p. 33; 172 F. Supp. at 745).

According to the District Court, a confession was not coerced in 1936 unless there was a "clear showing of physical coercion" (R. 43; Petition for Certiorari, p. 27; 172 F. Supp. at 742). This premise is false and with it the entire argument of the District Court falls.

Even the very judge who presided over Reck's original trial did not share the District Court's notions of the law. At the conclusion of his preliminary hearing in 1936 on the admissibility of the confessions, Judge Burke stated:

> ". . . if the person making the confession was abused in any way either by striking or threatening *or any form of mental or physical abuse,* then the confessions would not be free and voluntary confessions" (Ex. 1, pp. 979-80). (Emphasis supplied.)

Judge Burke's views were certainly not novel in 1936 in refusing to distinguish between mental and physical coercion. The Wickersham Commission had pointed out five years earlier in 1931 the speciousness of attempted distinctions between physical and mental coercion for purposes of determining admissibility:

> "In the light of the legal principles that forbid the use of compulsion to obtain confessions, rigid distinctions between particular types of compulsion are out of place. Any one of the following conditions may prevent a self-incriminating statement by a prisoner from being truly voluntary: physical types of the third degree; mental types, even though these shade into permissible questioning * * *." IV Reports, National Commission on Law Observance and Enforcement. P. 168 (U. S. Govt. Printing Office 1931).

Support for Commission's reasoning can be found in a 1920 decision of the Illinois Supreme Court, *People* v. *Vinci*, 295

Ill. 419, and in numerous other pre-1936 decisions in other jurisdictions, all condemning coerced confessions where there was not only no clear showing of physical brutality but where the only coercion was mental. The cases are collected in the annotation in 69 L. Ed. 1, 9 *et seq.*

Long before 1936, this Court had held that mental coercion rendered confessions involuntary and hence inadmissible in evidence. In an 1897 case, the Court held that the Fifth Amendment barred such confessions from federal criminal trials, saying:

> "[T]he principle . . . under the law of nature . . . was in its essence comprehensive enough to exclude all manifestations of compulsion, *whether arising from torture or from moral causes.* . . . As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, *the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind,* that is, hope or fear, so that, however diverse might be the facts, the test of whether the confession was voluntary would be uniform, that is, would be ascertained by the condition of mind which the causes ordinarily operated to create." *Bram* v. *United States,* 168 U.S. 532, 547-48. (Emphasis supplied.)

The significance of this language is heightened by the circumstance that *Bram* was *not* a physical brutality case.

The lesson of *Bram* was reaffirmed in 1924 in *Ziang Sung Wan* v. *United States,* 266 U.S. 1, another Fifth Amendment decision excluding a confession as coerced although no physical brutality was employed by the officers who secured it. *Ziang Sung Wan* held that confessions obtained from a physically ill prisoner in the course of an incommunicado

detention of more than one week were coerced. Citing the *Bram* case, Justice Brandeis stated for the Court:

> "[A] confession obtained by compulsion must be excluded, whatever may have been the character of the compulsion. . . ." (266 U.S. at 14-15.)

It was against this background of Fifth Amendment case law that this Court, three months before Reck's conviction, held that the Fourteenth Amendment forbade the use of coerced confessions in State criminal trials. *Brown* v. *Mississippi*, 297 U.S. 278. The Court stated that such use offended a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 297 U.S. at 285-86. Although *Brown* dealt with confessions obtained by whipping, this Court made it clear just four years later that the principle in *Brown* was the same as that announced earlier in *Bram* and *Ziang Sung Wan*. In *Chambers* v. *Florida*, 309 U.S. 227, a psychological coercion case decided in 1940, the Court cited *Ziang Sung Wan* and stated that:

> "Just as our decision in *Brown* v. *Mississippi* was based upon the fact that the confessions were the result of compulsion, so in the present case, the admitted practices were such as to justify the statement that 'The undisputed facts showed that compulsion was applied.'" (309 U.S. at 239 and M. 13.)

Therefore, when the 1936 decision in *Brown* v. *Mississippi* is viewed in the context of the Fifth Amendment cases which preceded it and the Supreme Court's own explanation in *Chambers* of the meaning of the *Brown* case, it is clear that the true test of a confession's voluntariness has never been whether there was a "clear showing of physical coercion" but whether "the undisputed facts showed that

compulsion was applied." It is equally clear that as far back as *Bram* in 1897 the Supreme Court applied a "totality of circumstances" test to determine coercion in a non-brutality case:

> "Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted, yet when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who in law could be considered a free agent." (168 U.S. at 563-64.)

To be sure, the conclusion that a confession is the result of compulsion is established as a matter of law if the prisoner is struck by one blow. *Fikes* v. *Alabama*, 352 U.S. at 198. But this conclusion is certainly no less significant or compelling if it is reached by weighing the effect of sophisticated or crude psychological pressures upon the accused's weakening ability to resist. *Spano* v. *New York*, 360 U.S. at 321. Once coercion is established, the law does not distinguish between coerced confessions. No court has yet attempted to say that a confession produced by one blow is more "coerced" than one produced by days and nights of continuous secret interrogation, inadequate diet, and violent illness. The District Court should not have been the first to try.

The District Court's theories are not based upon any authority. That Court could not cite one case holding that convictions based upon confessions coerced in 1936 did not violate the Due Process Clause because not one decision of this Court has ever acknowledged that the year of the trial determines the constitutionality of the coercion. Nor could the District Court cite one case holding that coercion

in 1936 could be established *only* by a "clear showing of physical coercion" because not one decision of this Court has ever exempted mental coercion from the ban upon all coercion.

In short, the District Court never grasped the essence of this Court's decisions establishing that it is the ultimate fact of coercion—and not the particular means employed—that is crucial. These decisions condemn the use of confessions coerced by *any means* because coerced confessions are offensive to fundamental principles of justice and to the concepts of ordered liberty. As such, the Fourteenth Amendment condemned their use on the day of its adoption in 1868; it condemned their use in 1936 when Reck was convicted; and it condemns their use today when Reck's constitutional rights are at issue.

(2) *The District Court relied upon factual assumptions which find no support in the record and which are irrelevant to the issues in this case.*

The District Court assumed that Reck committed the Peacock murder and that he was too dangerous to be free (R. 52, 54, 55; Petition for Certiorari, Appendix C, pp. 33, 34; 172 F. Supp. at 745, 746). The District Court believed that these were practical elements which a judge could not ignore in passing upon the issue of whether Reck's constitutional rights were violated (R. 51; Petition for Certiorari, Appendix C, p. 32; 172 F. Supp. at 745). The District Court, however, not only committed legal error in considering these irrelevant "factors" (as the Court of Appeals did in considering the "credibility" of the confessions) but it fell into errors of fact in assuming that the record supported any findings of guilt or maladjustment (as the Court of Appeals did in assuming that the confessions were, in fact, credible).

The factors of guilt and adjustment to society are irrelevant to the constitutional issues involved. The Due Process Clause protects the guilty as well as the innocent. The question is whether the confession is coerced and not whether there is other evidence in the record to support the verdict. *Payne* v. *Arkansas,* 356 U.S. 560, 568. Similarly, the Due Process Clause protects the mentally retarded as well as the brilliant. See *Fikes* v. *Alabama,* 352 U.S. at 193. Any notion that only the well-adjusted have constitutional rights does not deserve serious consideration.

But even if guilt and adjustment were relevant, the record does not support the District Court's findings. The sole basis assigned by the District Court for believing in Reck's guilt was its statement that "Other than his own confession, the confessions of Goeth[e], Nash and Livingston tend to prove the crime against Reck" (R. 43; Petition for Certiorari, Appendix C, p. 26; 172 F. Supp. at 742). But the other confessions were not admissible evidence against Reck. The only theory upon which the confessions of the other boys could be used against Reck is that these confessions were made in his presence and that his failure to deny them constituted an adoption of their contents, *i.e.,* an admission by silence. But if Reck's own confessions were coerced, then it necessarily follows that his contemporaneous silence in the face of the confessions of the other boys was also coerced:

> "Clearly the same considerations that bar admission of the confession by Turner made over his own name extend to his contemporaneous adoption of the Johnson and Lofton confessions." *Turner* v. *Pennsylvania,* 338 U.S. 62, 65 (1949).

Therefore, by predicating Reck's guilt on the Nash, Goethe and Livingston confessions, and weighing this "factor" in

deciding whether Reck's constitutional rights had been violated, the District Judge assumed the point to be decided because the other confessions were not admissible against Reck if Reck's own contemporaneous confessions were coerced.

In addition, the District Judge failed to consider the fact that Livingston repudiated his confession, claimed that it was a lie and had been coerced, and protested his innocence. The District Judge also ignored the significant fact that, although Nash and Goethe were in the custody of the State and were present at the trial, they were never called to testify against Reck.[328] Thus, they were never subjected to cross-examination as to the truth or falsity of their extra-judicial assertions as to Reck's involvement in the crime. Nash and Goethe, at the time of Reck's trial, had already been sentenced on their pleas of guilty to the Peacock murder. Hence, they would have had no motive to lie on Reck's behalf in order to save themselves; indeed, their motivation may have been to lie on the State's behalf. Cf. *Napue* v. *Illinois*, 360 U.S. 264, 266. If the State thought that the Nash-Goethe story of the murder could withstand cross-examination, why did it not call to the stand these two "eye-witnesses" to the crime?

More puzzling than the District Court's belief that Reck was guilty was its opinion that Reck, due to his present mental condition, was a potential menace to society (R. 55; Petition for Certiorari, Appendix C, p. 34; 172 F. Supp. at

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[328] Nash and Goethe testified only at the preliminary hearing on the admissibility of the confessions. (See text at notes 323-26 *supra*). By way of contrast, the State was not similarly averse in an attempt to impeach Reck's credibility, to produce four witnesses during the final day and one-half of the trial to testify that Reck had a gun on other, unrelated occasions. Ex. 2, pp. 772, 818, 838, 988, 1049. Reck categorically denied this surprise testimony. Ex. 2, pp. 1032-40.

746). The District Court's contention that Reck's "mental condition could not have improved over 22 years in prison," (*ibid.*), finds no support in the record. The State never made such a claim. Reck's counsel, presuming such evidence would be totally irrelevant except in a commitment hearing or a parole board proceeding, made no attempt to prove that Reck was well-adjusted to society after so many years of punishment and rehabilitation. Of all the errors below, the District Court's denial of Reck's constitutional rights because he might be maladjusted was the most drastic.

Irrespective of guilt, adjustment or other "practical" matters, Emil Reck is entitled to a new trial as a matter of principle. The District Court had no basis in the record for concluding that Reck was guilty or that he was a danger to society. Even if the State could make a strong "practical" case for denying Reck a new trial, constitutional principles make it mandatory to set aside his conviction and order his release unless he is convicted in a new trial untainted by coerced confessions. Emil Reck's constitutional rights are not to be subordinated on the ground that society "does not favor his release" any more than the "conscience of society" can be divined as favoring his imprisonment without a fair trial (R. 55; Petition for Certiorari, Appendix C, pp. 34, 35; 172 F. Supp. at 746). The inherent injustice of such an approach was rejected in *Chambers* v. *Florida*, 309 U.S. 227, 240-41:

> "We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted

> power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victim of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."

It is submitted that due process of law similarly commands that no such practice as that disclosed by this Record shall consign Emil Reck to prison for 199 years.

Conclusion

The decision of the Court of Appeals below should be reversed and the cause remanded with directions that Respondent release Petitioner from custody within a reasonable time unless, within such time, the State grants Petitioner a new trial.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1960.

No. 181

EMIL RECK,

Petitioner.

vs.

JOSEPH E. RAGEN, Warden,

Respondent.

(On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.)

BRIEF FOR RESPONDENT.
Certificate of Service.

RESPONDENT'S ACCEPTANCE OF PETITIONER'S STATEMENT OF THE CASE.

In obedience to the practice prevailing at the bar of this Court, we do not restate the full substance of the evidence in this Statement of the Case; for the substance of that evidence is fully stated in the opinion of the Court of Appeals (274 F. 2d 250, *reprinted in full as Appendix to the Petition for Certiorari*, pp. 1 to 11) and in the brief for petitioner.

We comment upon the important details of the evidence under Point II of the Argument, *post*.

THE QUESTIONS PRESENTED.

In the view of the Attorney General of Illinois, the only question that this Court need decide is:

> 1. MUST THIS COURT OVERTURN THE CONCORDANT FINDINGS OF PETITIONER'S JURY, THE TRIAL JUDGE AT HIS ORIGINAL TRIAL, THE TRIAL JUDGE IN HIS POST-CONVICTION HEARING IN ILLINOIS, A UNANIMOUS SUPREME COURT OF ILLINOIS, THE DISTRICT COURT AND TWO JUDGES OF THE COURT OF APPEALS THAT PETITIONER'S CONFESSION WAS VOLUNTARY AND WAS NOT OBTAINED IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW?

Respondent submits that the question stated above should be answered in the negative and that when so answered, no other question need be decided.

But the district court's opinion raises and petitioner presses upon this Court two other questions, which are:

> 2. WAS THE DISTRICT COURT'S FINDING THAT PETITIONER'S CONFESSION WAS EXACTED BY "PSYCHOLOGICAL" COERCION, THE DISTRICT COURT EXPLICITLY FINDING THAT THAT CONFESSION WAS NOT THE RESULT OF "PHYSICAL" COERCION, "SO CLEARLY ERRONEOUS", THAT IT DID NOT BIND THE COURT OF APPEALS AND SHOULD NOT BIND THIS COURT?
>
> 3. IF THE DISTRICT COURT'S FINDING THAT PETITIONER'S CONFESSION WAS THE RESULT OF "PSYCHOLOGICAL" BUT NOT OF "PHYSICAL" COERCION, WAS THE DISTRICT COURT CORRECT IN APPRAISING THIS CASE BY THE CONSTITUTIONAL NORMS PREVAILING IN 1936, THE TIME OF PETITIONER'S TRIAL, AND NOT IN THE LIGHT OF THE "EVOLUTION" AND "EXPANSION" OF THE CONCEPT OF DUE PROCESS BY THIS COURT'S LATER DECISIONS?

SUMMARY OF ARGUMENT.

I. and II.

The evidence, examined in detail in the Argument, *post*, supports the findings of the jury, the trial judge who heard the case, the trial judge who considered the case on State post-conviction proceedings, a unanimous Supreme Court and two judges of the Court of Appeals that petitioner's confession was voluntary when tested by any standards. The voluntary character of that confession was attested by the disinterested *physicians*, not employed by any governmental agency, who observed petitioner at the very time that he made his final confession and confirmed his prior confessions. None of those physicians observed any of the physiological, neurological or psychological *stigmata* of which petitioner first complained many years after his conviction.

The concordant finding that there was no *physical* duress is sustained by the evidence of all of the judges who have considered this case, including the district court and the dissenting judge of the court of appeals.

III.

The district court's finding that "psychological" duress produced the confession is in conflict with the determination of all of the Illinois jurors and judges who passed upon this case and is inconsistent with the district court's own finding that there was no "physical" coercion.

The finding of "psychological coercion" is clearly erroneous.

IV.

If this Court must pass upon the trial court's holding that petitioner's claim of denial of due process is to be determined by the norms of due process existing at the time of petitioner's conviction in 1936, it should hold that the district court correctly applied the standards obtaining at the time of petitioner's conviction to this case.

ARGUMENT.

I.

The concordant findings of the jury, the judge at petitioner's original trial, the trial judge on his post-conviction hearing, all of the justices of the Supreme Court of Illinois, the district judge and the Court of Appeals (one justice dissenting) in this case that petitioner's confessions were voluntary should not be disturbed.

Twelve jurors, the judge at petitioner's original trial, the judge who presided at relator's post-conviction hearing, a unanimous Supreme Court of Illinois, an experienced United States District Judge and a majority of the Court of Appeals have found that petitioner's confession was not obtained by violation of his Federal constitutional rights.

Although this virtual unanimity of judicial opinion is not binding upon this Court, it should not be disturbed unless compelling considerations require reversal.

Of course, this Court will review only uncontradicted matters of fact in a case assailing a conviction in a State court upon the grounds that a confession was allegedly obtained without due process of law. *Thomas* v. *Arizona*, 356 U. S. 390, 78 S. Ct. 885. In that case the Court was urged to weigh disputed testimony and reach a conclusion different from that of the original triers of fact and the State courts. The Court said:

> "Whatever the merits of the dispute, our inquiry clearly is limited to a study of the undisputed portions of the record. '(T)here has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such

conflict comes here authoritatively resolved (against petitioner) by the State's adjudication.' *Watts* v. *Indiana*, 338 U. S. 49, 51-52 1949). Time and again we have refused to consider disputed facts when determining the issue of coercion. See *Gallegos* v. *Nebraska*, 342 U. S. 55, 60-61 (1951); *Haley* v. *Ohio*, 332 U. S. 596, 597-598 (1948); *Ward* v. *Texas*, 316 U. S. 547 (1942). The rationale behind such exclusion of course, lies in the superior opportunity of trial court and jury to observe the witnesses and weigh the fleeting intangibles which may indicate truth or falsehood. We abide by the wisdom of that reasoning."

II.

The confession made by petitioner is demonstrably voluntary and not a product of coercion.

On the issue of "psychological" coercion, the test, if indeed we can find a statement of a test, as distinguished from a mere conclusion in each particular case, is probably best stated in *Stein* v. *New York*, 346 U. S. 156, commencing at p. 184, as follows:

> "This Court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive.
>
> "Of course, such inquiries have limits. But the limits are not defined merely by calling an interrogation an 'inquisition,' which adds to the problem only the emotions inherited from medieval experience. The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing."

In that case the Court related its general rule to the specific facts in the case in saying:

"Of course, these confessions were not voluntary in the sense that petitioners wanted to make them or that they were completely spontaneous, like a confession to a priest, a lawyer, or a psychiatrist. But in this sense no criminal confession is voluntary.

"Cooper's and Stein's confessions obviously came when they were convinced that their dance was over and the time had come to pay the fiddler . . . That confession came at a time when he must have known that the police already knew enough, from Jeppeson and Brassett, to make this implication inevitable. Stein held out until Cooper had confessed and implicated him. Both confessions were 'voluntary,' in the only sense in which confessions to the police by one under arrest and suspicion ever are. The state courts could properly find an absence of psychological coercion." (Emphasis supplied.)

Thus the question is squarely raised: Was the confession made herein the product of continuous unrelenting police pressure in the sense that the petitioner confessed in order to avoid further interrogation or did he confess because he knew that the state was well aware of his participation in the crime and that nothing whatever could be gained by continued silence?

The answer is obvious when one considers the circumstances previously related surrounding his confession. We do not have, as is true in the many cases cited by petitioner, a situation where a process of continuous detention and relentless questioning ultimately brings forth a confession.

The record presents, instead, a situation wherein after the first accusation of the murder of Dr. Peacock the petitioner became ill and was, instead of being relentlessly questioned, immediately hospitalized. The following morning, questioned by the police, who were then informed of his guilt by virtue of the other boys' confession and reenactment of the crime he reiterated his denials.

Taken in the afternoon to the State's Attorney's Office where he was met by the then First Assistant State's Attorney, Mr. Wilbur Crowley, whom he was seeing for the first time, he again refused to confess, but did relate, after a very short time, a complete and comprehensive story of the crime, saying that it was told him by another. Thereupon, the other confessed murderers were brought in and petitioner *was not only accused by them but urged by Goethe to confess.* It was at this point that Reck admitted his guilt in the murder of Dr. Peacock. If we may adopt this Court's language in the *Stein* case, Reck's confession obviously came when he was convinced the dance was over and the time had come to pay the fiddler.

We first note that relator did not confess his participation in the killing of Dr. Peacock at any of the times when he was in private conversations with law-enforcing officers. It was not until he was confronted by his co-defendants Nash and Goethe that he confessed when they adjured him to do so.

The uncontradicted testimony of Wilbur Crowley, First Assistant State's Attorney at the time of petitioner's confession, is that after he, Crowley, had talked with the codefendants, he instructed that petitioner be brought into their presence. His testimony continues (*Bill of Exceptions at trial*, Vol. II, 226-8 to 226-20) as follows:

> "So I instructed that Reck be brought into their presence and I had Reck seated down in front of Nash and Goethe where he could face them, and then I sat alongside of them; and Captain Harry O'Connell was there, and yourself, Mr. Varnes was there, Chief of Detectives Sullivan was in that room, Captain Horan was there, Sargeant Reilly was there, and a few other officers were around at that particular time.
>
> "I said to Durland Nash, 'Do you know this man?' and I pointed to Reck. He said, 'Yes.' I said, 'Who is

that?' He said, 'Emil Reck.' I said to Robert Goethe, 'Do you know him?' He said, 'Yes, it is Emil Reck.' So then I asked Reck, 'Do you know these two boys?' Reck said, 'Yes,' and he named Robert Goethe and Durland Nash. Now, I said, 'Reck, have you had any trouble with either of these two boys?' He said, 'No.' 'Have you any ill feeling toward them?' He said, 'No.' I asked Nash and Goethe whether or not either of them had any ill feeling toward Reck, and they said, 'No.' I asked them if for any reason they would tell any lies about Reck, and they said they would not.

"So then I said to Durland Nash, 'Now, Durland, tell Reck what you have told us about the Peacock case.' Nash then told Reck in the presence of all of us that he was with them when they called up the Doctor and arranged for the Doctor to come over to 6438 North Whipple Street; that when the Doctor came there they intercepted him on his way into the house, they forced him back into the automobile and that Goethe sat in the front seat on the right-hand side and he, Durland Nash, drove the car. He told Reck that he sat in the back seat alongside of the victim, Dr. Peacock; that they drove up to the next block, the car stopped, that Reck and Goethe got out of the car with the Doctor, took him over on the sidewalk, that a struggle occurred over there; that Nash observed the struggle; in the course of the struggle the Doctor was struck by Goethe and that he did not fall right away; that Goethe then struck the Doctor on the head with the gun and that the Doctor, and I mean Goethe and Reck struggled with the Doctor, and carried his body over to the car near the automobile that had been some distance away, and that Reck struck him on the head with a club that Reck had concealed in his coat, struck him several times on the head, and that Nash had said to Reck, 'What you doing that for' and Reck said to him, 'I want to make sure he is dead.'

"So I said to Reck, 'What about it?' He hesitated a minute and did not answer, hung his head, and he said,

'I didn't do it.' Well, I said, 'Do you know of any reason why Nash would tell that story and lie about you?' He said, 'No.'

"I said, 'All right, Goethe, what about it? Did Nash tell Reck the truth about what occurred?' And Goethe said, 'Yes.' I said, 'Goethe, did you hit the Doctor?' and Goethe said, 'Yes, I did.' 'What did you hit him with?' 'I hit him with a gun.' 'Did anybody else hit him?' 'Yes.' 'Who hit him?' He said, 'Reck hit him on the head with the club he had.'

"So I said, 'What about it, Reck' and just then Goethe interrupted, 'Go ahead, Emil, tell them the truth about it, you know you were there, and you know we are not lying about it.' So I said, 'What about it, Emil, were you there? Did you do those things?' 'Well,' he said, 'I will tell you, I was there' but he said, 'I didn't hit him on the head.'

"I said, 'Why would these boys say you did hit him on the head if you didn't do it? Now, first of all, you lied and said you were not there. Now, you say you were there but you didn't hit him on the head. Are you willing to tell the whole truth about it to Mr. Kearney if he takes a statement?' He said, 'Yes.' I said, 'Well, you must tell the whole truth about it now; and what about this hitting?' I said, 'These boys apparently have accounted for the fact that he was hit once, but this man was hit several times, we know that, we have found the body.' So he said, 'Well, I didn't hit him.' 'Well, if you didn't hit him, who hit him?' He said, 'Mike Livingston.'

"I then directed that Mike Livingston be brought before Emil Reck, to confront Reck with regard to that statement to the effect that Mike Livingston was supposed to have hit him. In the meantime then I had another appointment, I had to leave, and did not get back then for about an hour after that.

"Q. Well, now when you came back, did you see these defendants again with the other defendants, Nash and Goethe in your office?

"A. Yes.

"Q. That evening? A. When I came back I saw the defendants, Nash and Goethe, they were still in your office. The defendants, Livingston and Reck, were in the police room sitting at a table; and if I remember correctly, were eating or playing cards at that time. That was about the hour of, I should judge, five-thirty P. M.

"Q. Now, I will show you a document that has been heretofore marked People's Exhibit 9 and direct your attention to the fourth section, 'Emil Reck, M. R. Livingston, Robert Goethe, and Durland Nash,' on the back page thereof; were you present when those signatures were attached?

"A. I was.

"Q. And who signed that document?

"A. Emil Reck signed the signature which appears as 'Emil Reck'; Michael Livingston signed the signature which appears as 'Michael Livingston'; Robert Goethe signed the signature which appears as 'Robert Goethe'; and Durland Nash signed the signature which appears as 'Durland Nash.' The witnesses—I signed the signature which appears 'Wilbert F. Crowley'; and 'H. J. O'Connell's' signature was signed by Captain Harry O'Connell, 'Bernard P. Reilly', that signature was signed by Officer Reilly.

"Q. And previous to the time that the signatures were affixed to that document by the defendant, what if anything had been done with it by you?

"A. I handed a copy to Michael Livingston, a copy to Robert Goethe, and a copy to Durland Nash. I told Reck to sit close to Mike Livingston, they were seated in front of me, with Reck on the left-hand side; as I faced them, on my left-hand side; then Livingston, then Goethe, and then Nash. I told Reck to push up close to Livingston so that they could both watch the same copy and follow me as I read. Reck at that time said he didn't care to follow along on that state-

ment, that he would listen to me; and I started to read the statement and I read it out loud and they turned the pages with me and followed. When I got to page 3 I read the question, 'Who do you live with?' and I read this answer, 'My mother and two sisters.' Reck said, 'Wait a minute, that is not correct; it should be. 'My father and two sisters.' So I said, 'All right, we will make a note of that so that when we are through we will make any corrections you boys want.'

"So I made a notation of that and at the conclusion of the statement, Reck was permitted to change that in his own handwriting and to O.K. it with his own initials. After completing the statements, reading it in its entirety, I asked the boys whether or not they would sign it and they said, 'Yes.' I then placed it before Emil Reck, and Emil Reck signed his name; and Michael Livingston then signed his name; then Robert Goethe was the third, and Durland Nash signed last. After the signatures were appended on it, and we had completed it and we were ready to leave for the evening, why some newspaper photographers were there and they asked permission to take pictures and I said, if the boys were satisfied to have their pictures taken, we had no objection. So the boys then sat around the table and posed for the picture like as though they were signing a statement. That was all that transpired that evening.

"Q. Now, did you see the defendants again on Sunday, March the 29th?

"A. Yes, I saw all of the defendants again on Sunday afternoon, March 29th.

"Q. Did anything transpire that Sunday afternoon?

"A. Statements were taken from each one individually and apart from the others.

"Q. But what was done with those statements? Will you tell the Court and jury?

"A. After the joint statement was taken, I had a conversation with Mr. Kearney. Subsequent to that I appeared at the State's Attorney's Office and met Captain Gilbert. That was about two P. M., and we had a discussion. After the discussion each of the defendants were then called in separately and individual statements were taken from them. While those individual statements were being written up, I made some telephone calls to certain men who sat as Foremen of past Grand Juries.

"Q. In this building? A. In this building. They had completed their services, and we were acquainted with them by virtue of the fact that they had served on Grand Juries; and I picked the names out from our list at random and called them.

Finally, and the following facts are most important, petitioner reiterated his confession, as did his co-defendants, before a panel of physicians, prominent private citizens and former foremen of grand juries.

"In the meantime I called doctors that were members of a committee at the Chicago Medical Society; and all of the parties were requested to be in our office as early as possible around the hour of seven P. M., that being the hour that we anticipated the writing of the statements would be completed.

"In the meantime after each defendant would complete his statement, I instructed that the defendant be taken over to the fifth floor of the Jail Building, where the administration quarters are, and where we have cots and beds and shower baths and a room that we have converted for the holding of prisoners we intend to use as witnesses. I instructed they be brought over there and be given an opportunity to take a shower and change clothes. In the meantime some of them had sent for clothes. Nash, I know, had some fresh clothes brought in to him, and he was given an opportunity to take a bath and change clothing over there. Each other prisoner as they completed their statement,

they were taken over there and allowed to bathe or freshen up, clean up, and then they were brought back when the men were all assembled and the statements had been completed so that we could read the statements to them in a group.

"Q. Now, I will show you People's Exhibit 5, were you present when the signatures were attached to that document?

"A. I was.

"Q. And People's Exhibit 6, were you present when the signatures were attached to that document?

"A. I was.

"Q. And People's Exhibit 7, were you present when those signatures were attached?

"A. I was.

"Q. And likewise, People's Exhibit [Exhibit number missing from transcript.] A. I was.

"Q. Were those documents all signed at approximately the same time under the same circumstances?

"A. Yes, sir.

"Q. Will you tell the Court and jury what was done immediately preceding the time the documents were signed?

"A. About the hour of seven P. M., several Doctors, including Dr. Scatcliffe, Dr. Day, Dr. Foley, Dr. Miller and a Doctor with an unusual name, appeared at our office, and a Mr. Frank Landon, a business man, appeared there; and in addition to that we had Mr. Buchner, Mr. Munickie, and Mr. Styles, who were Ex-foremen of Grand Juries. And we seated them around in Captain Gilbert's office. Then we arranged four chairs in front of them, and I sat behind the desk. I explained to the Doctors and the business men assembled, I said, 'The purpose of calling you men is to have you appear as witnesses in connection with the reading and signing of statements by the young men who have confessed in connection with the Peacock case.'

"After a somewhat clear statement about what their duties were to be, then I arranged to have the boys brought in, and they were brought in and they were sitting down. As they faced me, Durland Nash was on my left, Reck sat next to him, Goethe next to Reck, and Michael Livingston was on the, pardon me, I am wrong there—Goethe was on my left, Reck sat next to him, Nash sat between Reck and Livingston, who was on my right-hand side, so I read all the statements in which the boys faced me. I read Michael Livingston's statement first; then I read the statement of Nash—

"Mr. Boyle: Livingston's is People's Exhibit—

"A. People's Exhibit 6; and I asked the boys each to pay attention while I read the statement; but I only gave a copy of the statement to the boy who was the one that made it, so I gave Livingston a copy of his own statement, and he followed as I read, and I read loud enough so that everybody in the room could hear me. After completing Livingston's statement, he said there was one minor correction. I don't even know whether we made it, the answer was 'V' instead of 'V-8' and he corrected me on that, he said it should be 'V-8'.

"Then I read the statement of Durland Nash; and then I read the statement of Emil Reck; and last, I read the statement of Robert Goethe. I asked the boys if they had anything they wanted to say at that time. They did not have anything to say at that particular time. So I asked them if they would sign them, so they said they would. So the boys then each signed their own statement.

"Q. What, if anything, was said about the truthfulness of this statement by any of the boys?

"A. I don't recollect anything now, at that particular time. At the conclusion of the statements, I can't recollect anything that was said about that at that time.

"Q. Then after they were signed by the defendants, the other gentlemen signed, you said?

"A. After they were signed by the defendants, then all the parties there present signed as witnesses to the statements."

It thus appears that petitioner not only confessed to Crowley but reiterated his confession in the presence of a committee of physicians, foremen of grand juries that had investigated the case and other unofficial citizens.

To be sure, this panel of physicians, foremen of grand juries and other citizens who were not law-enforcing agents did not know the circumstances that preceded petitioner's acknowledgment of his guilt in their presence. But the jury and the Illinois courts knew those circumstances. Among the committee were *physicians*, none of whom perceived any physiological, neurological or psychological *stigmata* such as those claimed by petitioner many years after his conviction.

This is one of the few cases in the country and, as far as we are aware, the only case that has reached this Court where physicians not employed by any government attested to the voluntary character of an admission of guilt.

The decision of this Court that is most nearly apposite to the present case is *Lisenba* v. *California*, 314 U. S. 219, decided in 1941.

That case, like the present case, is one in which the defendant was accused of a shocking murder, persisted in his denial of guilt at all of the times during persistent inquiries by state law-enforcing and prosecuting officials *under circumstances which all of the members of this Court denounced as illegal* and did not confess until, as was true in the instant case, he was confronted by the accusations of a codefendant.

More particularly, Lisenba, also known and referred to as James by the Supreme Court of the United States, was

arrested for the murder of James' wife under horrifying circumstances that are narrated at length in the opinion. James was held incommunicado from April 19, 1936, until May 2nd of that year, *a period of two weeks, during which time he was continually questioned and consistently proclaimed his innocence.*

On May 2nd, twenty-one days after James' arrest, Hope James' codefendant, who had been arrested on May 1st, implicated James. James, confronted by Hope's statements incriminating him, confessed.

To be sure, James had consulted an attorney, which is not true with respect to petitioner.

But the *rationale* of the decision of this Court was not that James had talked to an attorney but that the lower courts were justified in finding that notwithstanding what this Court declared to be "the violations of law involved in the treatment of petitioner," he confessed because he was implicated by a co-defendant.

The court said at pages 240-241:

> "Like the Supreme Court of California, we disapprove the violations of law involved in the treatment of the petitioner, and we think it right to add that where a prisoner, held incommunicado, is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means. Officials of the law must realize that if they indulge in such practices they may, in the end, defeat rather than further the ends of justice. Their lawless practices here took them close to the line. But on the facts as we have endeavored fairly to set them forth, and in the light of the findings in the state courts, we cannot hold that the illegal conduct in which the law enforcement of-

> ficers of California indulged, by the prolonged questioning of the prisoner before arraignment, and in the absence of counsel, or their questioning on May 2, coerced the confessions, the introduction of which is the infringement of due process of which the petitioner complains."

It is true that in the *Lisenba* case, the defendant admitted that he would not have made his confession but for the accusation of his co-defendant. In the instant case, the findings of the jury and all of the judges who have reviewed petitioner's contentions clearly take the place of such an admission on the part of petitioner.

Also similar to the instant case is *Gallegos* v. *Nebraska*, 342 U. S. 55, decided in 1951. In that case, the defendant, one Gallegos, was illegally detained for *twenty-five days* by federal and state officers before he was brought before a magistrate and confessed. He claimed "physical torture and threats of torture, mental duress, illegal transportation and illegal detention" in violation of the Federal and State constitutions.

In that case, as in this case, there was a conflict of evidence as to whether the defendant was maltreated by officers.

The Supreme Court of the United States held that twenty-five days of concededly illegal detention, there being a dispute as to whether the accused was physically maltreated, did not require the exclusion under the due process clause of the accused's confession.

The court said at pages 65-66:

> "So far as due process affects admissions before trial of the defendant, the accepted test is their voluntariness. This requires appraisal of the facts of each particular case open to consideration by this Court. In recent cases, where undisputed facts existed far

more likely to produce involuntary confessions than those in this case, there was disagreement as to whether due process was violated. The facts here to support a claim of denial of due process are not so convincing."

In the *Lisenba* case, 314 U. S. 219, the *Gallegos* case, 342 U. S. 55, and the instant case, the defendants were detained, the detention in the *Lisenba* case being for 21 days, in the *Gallegos* case, for 25 days, and in the instant case, for only *four* (although only a few minutes on Friday and a few hours on Saturday concerned the crime for which he stands convicted) days prior to confessing. In the *Gallegos* case there was a claim, denied by the officers and rejected by the State courts, of brutality or "coercion" during the period of unlawful detention.

In the *Lisenba* and *Gallegos* cases, this Court refused to disturb the findings of the State courts that the confessions were obtained upon admittedly unlawful detention.

The learned and experienced district judge held in this case that petitioner's claim of denial of due process must be tested by the due process clause, that clause to be read as it was expounded by the Supreme Court of the United States as of the year 1936, the year of petitioner's conviction, and not by the subsequent expansion of that clause by such cases as *Chambers* v. *Florida*, 309 U. S. 227 and *Ashcraft* v. *Tennessee*, 327 U. S. 274, and other later decisions that expatiate upon the scope of the due process clause in cases of confessions.

III.

The district court's finding that petitioner's confession was extracted from him by "psychological coercion," coupled with that court's finding that the confession was not extorted by "physical coercion," was so "clearly erroneous" that the Court of Appeals was not bound to accept it and this court should not sustain it.

This Court's Rule 52 of the Rules of Civil Procedure provides that "in all actions tried upon the facts without a jury or with an advisory jury," the court's findings of fact

> "shall not be set aside unless clearly erroneous, *and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*" (Emphasis supplied.)

Although the text of the rule refers to "all actions tried upon the facts without a jury," its context makes it plain that it is designed for those cases in which the district court tries issues of fact as a court of first instance.

The rule was not written for cases in which State courts have heard the witnesses, appraised their credibility, assayed the weight of the evidence and made explicit pronouncements as to their findings of fact.

A district judge who considers a petition for *habeas corpus* solely upon the record made in State courts has no more opportunity to "judge the credibility of the witnesses" than have the judges of a Court of Appeals or than this Court has.

Such a district court has less opportunity to "judge the credibility of the witnesses" than had the jury and the trial judge to whom a case was tried in the State trial court. Nor does he have the benefit, the inestimable value of which this Court knows better than can any lawyers, of consultations with other members of a collegial bench.

Where a district judge reaches a conclusion of fact that is contrary to the finding of a jury and a trial judge who has heard the witnesses and to the opinion of a State Supreme Court, which did not hear the witnesses but has had as good an opportunity to appraise their credibility as had a district judge who reads only the same record, the findings of the district court have the same import that is accorded to the findings of a lower court or administrative tribunal that has seen and heard the evidence.

In so far as the district court in this case found that petitioner's confession was not wrested from him by physical coercion, that court's findings comport with those of the jury, two Illinois trial judges, a unanimous Supreme Court of Illinois and all of the judges of the Court of Appeals: for although Judge Duffy dissented, he did not disturb the district court's finding that petitioner's confession was not the product of "physical coercion."

We therefore argue in this Court the question whether petitioner's confession was obtained by "physical coercion" as a question that this Court may answer for itself.

The Court of Appeals did not explicitly discuss the district judge's finding that the confession was the product of "psychological coercion." But that court clearly expressed its disagreement with that finding in the following passage of its opinion (274 F. 2d 250, p. 253):

> "Invoking the aid of the fourteenth amendment tto the constitution of the United States, Reck now contends that his confessions were the product of coercion, citing his lengthy detention incommunicado and the illness which developed during that period of time. We are convinced, however, that the evidence proves that none of the treatment which he received while he was being detained prior to Saturday afternoon produced the confessions by Reck. While he had become ill when Captain Aiken on Friday night probingly accused him of the Peacock killing, his rugged determination to say nothing to reveal his involvement in that

affair had prevented the authorities from obtaining any incriminatory admission from him in regard to that crime until Saturday afternoon in the office of the state's attorney. Until then, Reck, the strong man of the group, had stood fast and on this occasion it was only the realization that Goethe and Nash had confessed the Peacock killing and had implicated him, and had, in the presence of Crowley called upon Reck to tell 'the truth about it, you know you were there, and you know we are not lying about it', that Reck realized that the 'dance was over and the time had come to pay the fiddler'. The latter words are quoted from *Stein* v. *New York*, 346 U. S. 156."

In considering the question whether petitioner's confession was the product of "psychological coercion," the facts summarized in the next paragraph are material. Indeed, we submit that they are controlling:

Petitioner became ill *immediately* upon being questioned concerning the slaying of Dr. Peacock. Yet he was steadfast in his denials of guilt, notwithstanding "nervous reactions" that were sufficient to make him intermittently very ill but not sufficient to prevail upon him to confess, until *after* his co-defendants had admitted their guilt.

The record supports the inference drawn by the jurors, all of the State judges who have reviewed this case and two judges of the Court of Appeals that the fact that petitioner became ill immediately upon being accused of Dr. Peacock's murder, when the illness could not have been the result of coercion, but did not confess to that murder until he was implicated by his co-arrestees of the killing meant that he did not yield to psychological pressure but that the "confession came at a time when he must have known that the police already knew enough, from [petitioner's co-arrestees], to make his implication inevitable," and that he "held out until after [his co-arrestees] had confessed and implicated him."

Any jury might find and most jurors would find that an accused who has not become unwell when questioned about

many crimes but becomes ill *immediately* upon being asked about a certain crime feels illness as the result of guilt when he subsequently confirms guilt by a reiterated confession.

Respondent therefore urges that the district court's finding that petitioner's confession was the result of "psychological coercion" is not only overborne by the contrary findings in the State courts and of the Court of Appeals but is in conflict with the district court's finding that that confession was *not* the result of "physical coercion."

Respondent therefore submits that the district court's finding of psychological duress is clearly erroneous.

IV.

If this Court sustains the district court's finding that petitioner's confession was the product of "psychological coercion", and we submit that it should not sustain that finding, then it should also sustain the district court's holding that the question of due process in this case should be answered in accordance with the constitutional norms prevailing at the time of petitioner's trial and conviction.

Respondent submits that this Court need not determine whether the constitutionality of petitioner's conviction is to be judged by the tests of due process declared by the Supreme Court of the United States as of 1936 or in the light of later cases; for under any norm recognized by this court at this time until the present, the State courts were justified in finding that petitioner's claims of brutality were false and that it was confrontation by petitioner's co-defendants, not the exertions of law-enforcing officers, that induced his voluntary confession to the crime of murder.

If, however, the court deems it is confronted by the question whether petitioner's conviction must be judged by the standards of 1936 or retrospectively by expanded standards, we press upon the court the excellent opinion of the district court.

We adopt, not as binding upon this Court but as expository of our own argument, the following passages from the opinion of the district court:

"As Justice Frankfurter so well said in *Griffin* v. *Illinois*, 351 U. S. 12, 25 and 26:

"We must be mindful of the fact that there are undoubtedly convicts under confinement in Illinois prisons, in numbers unknown to us and under unappealed sentences imposed years ago, who will find justification in this opinion, unless properly qualified, for proceedings both in the state and the federal courts upon claims that they are under illegal detention in that they have been denied a right under the Federal Constitution. It would be an easy answer that a claim that was not duly asserted—as was the timely claim by these petitioners—cannot be asserted now. The answer is too easy. Candor compels acknowledgment that the decision rendered today is a new ruling. Candor compels the further acknowledgment that it would not be unreasonable for all indigent defendants, now incarcerated, who at the time were unable to pay for transcripts of proceedings in trial courts, to urge that they were justified in assuming that such a restriction upon criminal appeals in Illinois was presumably a valid exercise of the State's power at the time when they suffered its consequences. Therefore, it could well be claimed that thereby any conscious waiver of a constitutional right is negatived.

"The Court ought neither to rely on casuistic arguments in denying constitutional claims, nor deem itself imprisoned within a formal, abstract dilemma. The judicial choice is not limited to a new ruling necessarily retrospective, or to rejection of what the requirements of equal protection of the laws, as now perceived, require. For sound reasoning, law generally speaks prospectively. More than a hundred years ago, for instance, the Supreme Court of Ohio, confronted with a problem not unlike the one before us, found no diffi-

culty in doing so when it concluded that the legislative divorces were unconstitutional. *Bingham* v. *Miller*, 17 Ohio 445. In arriving at a new principle, the judicial process is not impotent to define its scope and limits. Adjudication is not a mechanical exercise nor does it compel 'either/or' determinations.

"We should not indulge in the fiction that the law announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law. That this is consonant with the spirit of our law and justified by those considerations of reasons which should dominate the law, has been luminously expounded by Mr. Justice Cardozo, shortly before he came here and in an opinion which he wrote for the Court. See Address of Chief Judge Cardozo, 55, Report of New York State Bar Assn., 263, 294 et seq., and *Great Northern R. Co.* v. *Sunburst Oil and Refining Co.*, 287 U. S. 358, 363-366. Such a molding of law, by way of adjudication, is peculiarly applicable to the problem at hand. The rule of law announced this day should be delimited as indicated."

"It is my opinion that, generally speaking, the Due Process Clause must likewise speak prospectively in Habeas Corpus cases with the emphasis upon the discretion of the individual district judge in each case. Historically, judges have always had a certain degree of discretion in cases of this nature. In England today, the trial judge may, in his discretion, admit a confession into evidence even though the Judge's Rules have been violated. *R.* v. *May*, 36 Cr. App. Rep. 91. The Supreme Court of the United States has recently recognized this principle in its approach to the problem of integration. It is my opinion that this same approach must be taken in cases such as the one at bar. A district judge, with the record before him, looking

beyond the *total circumstances,* should not be bound absolutely by this test.

"During my many years on the Bench, I have watched with great interest and satisfaction the vitalization of, the Due Process Clause through Supreme Court interpretation. However, I have also been aware of the practical aspects of such interpretation as herein enumerated. I am convinced from the language of the *Bartkus* (355 U. S. 281) and *Griffin* cases, (351 U. S. 12) that the United States Supreme Court is likewise aware of these problems. If, with great respect, I may conjecture, this might be the reason the Supreme Court denied Certiorari in the instant case.

"Re-evaluating the Due Process Clause as used in Habeas Corpus cases wherein the petitioner has been imprisoned throughout an era in which the Clause has undergone a changing interpretation, it is my opinion, based upon the history of the Clause, the practical aspects of the problems and the recent pronouncements of the United States Supreme Court, that in each case, the *totality* of circumstances test must be weighed against the 'relevant and conflicting factors' as interpreted by the 'conscience of society' with the final decision resting in the sound discretion of the judge. Exercising such discretion to the best of my ability in the light of all the factors herein set forth.

"I hold the Due Process Clause not violated in the instant case."

As Mr. Justice Frankfurther declared in his concurring opinion in *Griffin* v. *Illinois,* 351 U. S. 12, quoting Mr. Justice Brandeis in *United States* v. *Great Northern Ry. Co.,* 287 U. S. 58, courts may and should accomplish "such a molding of law, by way of adjudication," that the law may speak only "prospectively". *This he did in expounding the Constitution,* not in fashioning the common law for the District of Columbia or expanding a statutorily adopted

concept of the common law in a tax case or a case involving a tort.

But, as we have steadfastly contended, this Court need not determine whether petitioner's case is to be judged by the law of 1936 or the law of 1959; for the State courts were justified, as was the Court of Appeals, in holding that petitioner's claims of brutality were false, that it was confrontation by his accomplices, not coercion, which produced his confession and that petitioner has not been denied due process under any standards that this court has ever applied.

Conclusion

For the reasons urged in this brief, it is respectfully submitted that the judgments of the district court and of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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Certificate of Service.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 181

EMIL RECK,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER.

I

Respondent urges that this Court should not "weigh disputed testimony" in deciding whether Petitioner's confessions were the product of psychological coercion (Respondent's Brief, p. 5). Petitioner agrees. Every essential fact bearing upon the psychological coercion of Petitioner's confessions—set forth in detail in the Statement in Petitioner's principal brief (pp. 6-41)[1]—is established by uncontroverted testimony that:

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[1] For the Court's reference, Petitioner's principal brief contained one serious printer's error which should be noted. On page 15 thereof, the first line of footnote 80 was transposed with the first line of footnote 82.

1. At the time of his arrest, Petitioner had the intelligence of a ten or eleven-year-old child and was known as an "over sensitive" "weakling" who was prone to "cry pretty easily."

2. Petitioner, who was not informed of his right to counsel, his privilege against self-incrimination, or his right to a hearing before a magistrate, was held practically *incommunicado* and interrogated continually for eighty hours prior to his first confession and 102 hours prior to his second.

3. Petitioner, on the night before he confessed, was violently ill four times in three hours at the police station, fainting repeatedly, vomitting blood, and being unable to walk.

4. Petitioner had no solid food for at least twenty-four hours preceeding his first confession and forty-eight hours preceeding his second.

5. At the time of his confession, Petitioner was sick, his face was ashen, and he "walked weakly."

Respondent disputes none of these facts, which establish, beyond doubt, that Petitioner's confessions were the product of psychological coercion.

II.

Respondent relies upon *Stein* v. *New York*, 346 U.S. 156 (Respondent's Brief, pp. 6-8), *Lisenba* v. *California*, 314 U.S. 219 (Respondent's Brief, pp. 16-18), and *Gallegos* v. *Nebraska*, 342 U.S. 55 (Respondent's Brief, pp. 18-19). The inapplicability of these cases is demonstrated at pages 52-53 of Petitioner's principal brief. The only additional comment required is to correct Respondent's misrepresentation of fact concerning the *Lisenba* case (Respondent's Brief, p. 17):

> "James was held *incommunicado* from April 19, 1936, until May 2nd of that year, *a period of two weeks, during which time, he was continually questioned and consistently proclaimed his innocence.*" (Respondent's emphasis)

This is not true. This Court's *Lisenba* opinion clearly states:

> "There is no claim that from April 21, when [James] was lodged in the jail until May 2, he was interviewed, questioned, threatened, or mistreated by anyone." (314 U.S. at 231)

III.

Respondent also misrepresented to this Court that a jury decided that Petitioner's confessions were voluntary (Respondent's Brief, pp. 2, 3, 5, 18, 21). The trial jury never decided the issue of coercion. It was specifically instructed by the trial judge *not* to decide the issue of the confessions' competency and *not* to disregard the evidence of the confessions, and it was denied the defense instructions which would have given it the question of coercion (Ex. 2, pp. 1089, 1068, 1075).

Respondent further misrepresented to this Court that the district court below explicitly found that there was no physical coercion (Respondent's Brief, pp. 2, 3, 21). The district court made no such finding. If the district court made any finding on the issue of physical coercion, it was never explicit, indicating only that, although the evidence was conflicting, Petitioner's was more credible in establishing a clear import of police brutality (Petitioner's Brief, p. 49).

IV.

Finally, Respondent's reliance on the prior decisions in this case because they appear to present a "virtual unanimity of judicial opinion" should be dispelled (Respondent's Brief, pp. 3, 5, 21). This is not one of many cases in which state courts have been consistently applying an improper legal standard (*Rogers* v. *Richmond*, ... U.S. ...., ..., U.S. Law Week, ..., March ...., 1961), but a case in which this Court should review the entire record and decide the merits. The trial judge's decision was reached at a preliminary hearing without the benefit of more than 1,000 pages of subsequent testimony, most of which dealt with the inherently coercive circumstances under which the confessions were extracted. The post-conviction judge made his decision without having read either these 1,000 pages (Ex. 2) or the transcript of the preliminary hearing (Ex. 1, pp. 445, 334, 430-31). The Illinois Supreme Court omitted any discussion of psychological coercion and ignored the numerous pertinent decisions of this Court. The Court of Appeals nevertheless adopted the Illinois Supreme Court's opinion almost *in toto* and ignored the opinion of the district court below. The district court correctly refused to accept the reasoning of the Illinois Supreme Court but was misled by the belief that police brutality must be overlooked lest alleged criminals go unpunished. Unfortunately, the district court ignored the possibility—indeed, the probability in Petitioner's case—that such police excesses frequently result in the conviction of the innocent.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 181.—October Term, 1960.

Emil Reck, Petitioner, v. Frank J. Pate, Warden.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 12, 1961.]

Mr. Justice Stewart delivered the opinion of the Court.

On the night of January 2, 1936, Dr. Silber C. Peacock, a Chicago physician, left his Edgewater Beach apartment in response to an emergency telephone call to attend a sick child. He never returned. The next day his lifeless body was found in his automobile on a Chicago street. It was apparent that he had been brutally murdered. On Wednesday, March 25, 1936, the petitioner, Emil Reck, and three others were arrested by the Chicago police on suspicion of stealing bicycles. Late the following Saturday afternoon Reck confessed to participation in the murder of Dr. Peacock. The next day he signed another written confession. At Reck's subsequent trial in the Criminal Court of Cook County, Illinois, the two confessions were, over timely objection, received in evidence against him. The jury found Reck guilty of murder, and he was sentenced to prison for a term of 199 years.

The conviction was affirmed by the Illinois Supreme Court, *People* v. *Reck*, 392 Ill. 311, 64 N. E. 2d 526. Several years later Reck filed a petition under the Illinois Post-Conviction Hearing Act, alleging that his confessions had been procured by coercion and that their use as evidence at his trial had, therefore, violated the Due Process

Clause of the Fourteenth Amendment.[1] After a hearing, the Criminal Court of Cook County denied relief. The Supreme Court of Illinois affirmed the Criminal Court's finding that due process had not been violated at Reck's trial. *Reck* v. *People*, 7 Ill. 2d 261, 130 N. E. 2d 200. This Court denied certiorari "without prejudice to an application for a writ of habeas corpus in an appropriate United States District Court." *Reck* v. *Illinois*, 351 U. S. 942.

Reck then filed a petition for habeas corpus in the United States District Court for the Northern District of Illinois. The writ issued, and at the hearing the District Court received in evidence the transcripts of all relevant proceedings in the Illinois courts.[2] In an opinion reviewing in detail the circumstances surrounding Reck's confession, the District Court held "the Due Process Clause not violated in the instant case." 172 F. Supp. 734. The Court of Appeals for the Seventh Circuit affirmed, one judge dissenting, 274 F. 2d 250, and we granted certiorari, 363 U. S. 838. The only question presented is whether the State of Illinois violated the Due Process Clause of the Fourteenth Amendment by using as evidence at Reck's trial confessions which he had been coerced into making.

The question whether there has been a violation of the Due Process Clause of the Fourteenth Amendment by the introduction of an involuntary confession is one which it is the ultimate responsibility of this Court to determine. See *Malinski* v. *New York*, 324 U. S. 401,

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[1] So far as the record shows, this was the first time after the trial that petitioner raised this issue.

[2] The transcripts of the pre-trial sanity proceedings, of the proceedings at the hearing on the admissibility of the confessions conducted by the trial judge outside the presence of the jury, of the trial proceedings in the presence of the jury, and of the proceedings at the post-conviction hearing.

404; *Thomas* v. *Arizona*, 356 U. S. 390, 393; *Watts* v. *Indiana*, 338 U. S. 49, 51–52. After thoroughly reviewing the record in this case, we are satisfied that the district judge's summary of the undisputed facts is accurate and complete. Neither in brief nor oral argument did the respondent take issue with these findings. No useful purpose would be served by attempting to paraphrase the district judge's words:

> ". . . Emil Reck was at the time of this horrible crime but nineteen years old. Throughout his life he had been repeatedly classified as mentally retarded and deficient by psychologists and psychiatrists of the Institute for Juvenile Research in Chicago. At one time he had been committed to an institution for the feebleminded, where he had spent a year. He dropped out of school at the age of 16, never having completed the 7th grade, and was found to have the intelligence of a child between 10 and 11 years of age at the time of his trial. Aside from his retardation, he was never a behavior problem and bore no criminal record.
>
> "Reck was arrested in Chicago without a warrant at 11:00 a. m. Wednesday, March 25, 1936, on suspicion of stealing bicycles. He was then shuttled between the North Avenue Police Station and the Shakespeare Avenue Police Station until 1:15 p. m., at which time he was returned to the North Avenue Police Station and there interrogated mainly about bicycle thefts until 6:30 or 7:00 p. m. He was then taken to the Warren Avenue Police Station where he spent the night. During this time he was fed a ham sandwich and coffee at the North Avenue Station and a bologna sausage sandwich at the North Avenue Station and a bologna sausage sandwich at the Warren Avenue Station.

"On Thursday, at 10:00 a. m., Reck was brought back to the North Avenue Station where he was interrogated some six or seven hours about various crimes in the District. Afterwards, he was sent to the Shakespeare Station and later that evening he was taken downtown to the Detective Bureau where he was exhibited at a so-called 'show-up.' The record does not indicate where Reck spent the night. The record shows that Reck was fed an egg sandwich and a glass of milk on Thursday but apparently nothing else.

"The record is silent as to where Reck spent Friday morning but it is clear that interrogation was resumed sometime in the early afternoon. Friday evening over one hundred people congregated in the North Avenue Police Station where Reck was exhibited on the second floor. Shortly after 7:00 p. m. Reck fainted and was brought to the Cook County Hospital where he was examined by an intern who found no marks or bruises upon his body and rejected him for treatment. Reck was then taken directly back to the North Avenue Station where he was immediately again placed on exhibition. He again became sick and was taken to an unfurnished handball room, where a Sergeant Aitken, assigned to the Peacock murder investigation, questioned him about the Peacock murder for a short period of time. Reck again became sick and a Dr. Abraham was called who later testified that Reck was extremely nervous, that he was exposed and that his shirt was unbuttoned and hanging outside of his pants. He was rubbing his abdomen and complaining of pain in that region. After an examination of 60 to 90 seconds, Dr. Abraham left and Reck was questioned intermittently and exhibited to civilians until approximately 9:30 p. m.

when he became ill and vomited a considerable amount of blood on the floor.

"Reck was again brought to the Cook County Hospital at 10:15 p. m. on Friday where he was placed in a ward and given injections of morphine, atropine, and ipecac twice during the evening. At about 2:00 a. m. two physicians, Doctor Scatliff and Doctor Day, who were members of a Chicago Medical Society which had been assisting the police in the Peacock murder came at the request of Prosecutor Kearney to see if there were any marks of brutality on Reck. They found the door to Reck's room barred by a police officer. After securing permission from one, Police Captain O'Connell, they went in and found Reck asleep and therefore made only a cursory examination in the dark which revealed nothing conclusive. At 9:00 a. m. on Saturday, Reck told Dr. Zachary Felsher of the Cook County Hospital that the police had been beating him in the stomach. He also told Dr. Weissman of the same hospital that he had been beaten in the abdomen and chest over a three-day period. This was the first time since his arrest some 70 hours before that Reck had conversed with any civilian outside the presence of police officers. His father had attempted to see Reck on Thursday and Friday at the North Avenue Police Station and on Saturday at the Cook County Hospital. Each time he was refused.

"At 9:30 a. m. on Saturday, Reck was removed from the hospital in a wheelchair and was questioned about the Peacock murder as soon as he was transferred into Captain O'Connell's car to be transported to the North Avenue Police Station, where the questioning continued until the afternoon, when he was taken to the State's Attorney's office at approximately 2:00 p. m.

"Previously to this, on Friday evening, two of the boys, Nash and Goeth, who had been arrested with Reck, had confessed to the murder of Dr. Peacock, implicating Reck and one other boy, Livingston. At about 3:00 a. m. on Saturday, Livingston also agreed to sign a confession. (Upon arraignment, Livingston pleaded not guilty and alleged that he was subjected to physical abuse by the police.)

"On Saturday afternoon, Reck was questioned about the whereabouts of the gun which Goeth had told police that Reck possessed. After intensive interrogation, Reck admitted that Goeth had told him of the Peacock murder. About 4:30 p. m. in front of a group of officers and prosecutors, Reck was confronted with Nash and Goeth. Nash told the story which became his signed confession. Reck denied participation in the crime. Goeth then made the statement that Nash was telling the truth and implicated Reck. At this point Reck stated that he was present at the crime but that Livingston and not he struck Dr. Peacock.

"At 5:55 p. m. of the same Saturday, March 28, 1936, a joint confession was taken, at which time Reck was very weak and sick looking. At this point, Reck had been in custody almost 80 hours without counsel, without contact with his family, without a court appearance and without charge or bail. The text of this joint confession reveals mostly yes and no answer in the case of Reck. The interrogation did not deal with the gun or the automobile used in the crime and was signed by all that Saturday night.

"On Sunday, Reck was again interrogated in the State's Attorney's office and at 4:30 p. m. his individual statement was taken which was more or less a reiteration of the joint confession. The boys then

washed up and were given clean clothes. Thereafter, in a formal ceremony in front of numerous officers and prosecutors as well as twelve invited civilians, the statements were read to the boys, they were duly cautioned and the confessions were then signed. The boys did not know there were civilians present and were not permitted counsel. At this time Reck had been without solid food since Friday when he had an egg sandwich. He was placed on a milk diet by the doctor Friday night at the hospital.

"Reck was held in custody Monday, Tuesday and Wednesday, March 30 through April 1. Why, is not revealed in the record. On Thursday, April 2, 1936, Reck was arraigned in open court and pleaded *not guilty*. He had not seen his father or other relatives or any lawyer during this entire period." [3]

As the district judge further noted, the record "carries an unexpressed import of police brutality. . . ." Reck testified at length to beatings inflicted upon him on each of the four days he was in police custody before he confessed. His testimony was corroborated. The police, however, denied beating Reck, and, in view of this conflict in the evidence, we proceed upon the premise, as did the District Court, that the officers did not inflict deliberate physical abuse or injury upon Reck during the period they held him in their custody.[4] See *Thomas v. Arizona*,

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[3] The brief factual summary in the opinion of the Supreme Court of Illinois affirming the denial of post-conviction relief is entirely consistent with these findings:

"Petitioner was in the custody of the police for a week, during which time he was frequently ill, fainted several times, vomited blood on the floor of the police station and was twice taken to the hospital on a stretcher. During that week no formal charge was placed against petitioner, and he was confined practically *incommunicado*." 7 Ill. 2d 261, 264, 130 N. E. 2d 200, 202.

[4] This was also the implicit finding of the trial judge.

356 U. S. 390, 402–403; *Stein* v. *New York*, 346 U. S. 156, 183–184; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 152–153; *Ward* v. *Texas*, 316 U. S. 547, 551–552.

But it is hardly necessary to state that the question whether a confession was extracted by coercion does not depend simply upon whether the police resorted to the crude tactic of deliberate physical abuse. "[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama*, 361 U. S. 199, 206. The question in each case is whether a defendant's will was overborne at the time he confessed. *Chambers v. Florida*, 309 U. S. 227; *Watts* v. *Indiana*, 338 U. S. 49, 52, 53; *Leyra* v. *Denno*, 347 U. S. 556, 558. If so, the confession cannot be deemed "the product of a rational intellect and a free will," *Blackburn*, *supra*, at 208. In resolving the issue all the circumstances attendant upon the confession must be taken into account. See *Fikes* v. *Alabama*, 352 U. S. 191, 198; *Payne* v. *Arkansas*, 356 U. S. 560, 567. Physical mistreatment is but one such circumstance, albeit a circumstance which by itself weighs heavily. But other circumstances may combine to produce an effect just as impellingly coercive as the deliberate use of the third degree. Such, we think, were the undisputed circumstances of this case, as set out in detail by the District Court.

At the time of his arrest Reck was a nineteen-year-old youth of subnormal intelligence. He had no prior criminal record or experience with the police. He was held nearly eight days without a judicial hearing. Four of those days preceded his first confession. During that period Reck was subjected each day to six or seven hour stretches of relentless and incessant interrogation. The questioning was conducted by groups of officers. For the first three days the interrogation ranged over a wide variety of crimes. On the night of the third day of his detention the interrogation turned to the crime for which

petitioner stands convicted. During this same four-day period he was shuttled back and forth between police stations and interrogation rooms. In addition, Reck was intermittently placed on public exhibition in "show-ups." On the night before his confession, petitioner became ill while on display in such a "show-up." He was taken to the hospital, returned to the police station and put back on public display. When he again became ill he was removed from the "show-up," but interrogation in the windowless "handball court" continued relentlessly until he grew faint and vomited blood on the floor. Once more he was taken to the hospital, where he spent the night under the influence of drugs. The next morning he was removed from the hospital in a wheel chair, and intensive interrogation was immediately resumed. Some eight hours later Reck signed his first confession. The next afternoon he signed a second.

During the entire period preceding his confessions Reck was without adequate food, without counsel, and without the assistance of family or friends. He was, for all practical purposes, held incommunicado. He was physically weakened and in intense pain. We conclude that this total combination of circumstances "is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear." *Ashcraft* v. *Tennessee*, 322 U. S. 143, 154.

It is true that this case lacks the physical brutality present in *Brown* v. *Mississippi*, 297 U. S. 278, the threat of mob violence apparent in *Payne* v. *Arkansas*, 356 U. S. 560, the thirty-six hours of consecutive questioning found in *Ashcraft* v. *Tennessee*, 322 U. S. 143, the threats against defendant's family used in *Harris* v. *South Carolina*, 338 U. S. 68, or the deception employed in *Spano* v. *New York*, 360 U. S. 315, and *Leyra* v. *Denno*, 347 U. S. 556. Nor

was Reck's mentality apparently so irrational as that of the petitioner in *Blackburn* v. *Alabama*, 361 U. S. 199. However, it is equally true that Reck's youth, his subnormal intelligence, and his lack of previous experience with the police make it impossible to equate his powers of resistance to overbearing police tactics with those of the defendants in *Stein* v. *New York*, 346 U. S. 156, or *Lisenba* v. *California*, 314 U. S. 219.

Although the process of decision in this area, as in most, requires more than a mere color-matching of cases, it is not inappropriate to compare this case with *Turner* v. *Pennsylvania*, 338 U. S. 62, where we held a confession inadmissible on a record disclosing circumstances less compelling. Decision in *Turner* rested basically on three factors: the length of detention, the amount and manner of interrogation, and the fact that Turner had been held incommunicado by the police. Turner had been in custody for four nights and five days before he confessed. He had been questioned intermittently, as much as six hours in a day, sometimes by one, sometimes by several officers. He had been interrogated a total of some twenty-three hours. Reck was held the same length of time, under basically the same circumstances, before his second confession. He was held some twenty-four hours less than Turner before his first confession, but during that period he was subjected to more concentratedly intensive interrogation, in longer stretches. He also spent considerable periods of t me on public display in "show-up," a factor not present in Turner. In addition, Reck was weakened by illness, pain, and lack of food. Finally, unlike Turner, Reck must be regarded as a case of at least borderline mental retardation. The record here thus presents a totality of coercive circumstances far more aggravated than those which dictated our decision in *Turner*. See also *Johnson* v. *Pennsylvania*, 340 U. S. 881; *Fikes* v. *Alabama*, 352 U. S. 191.

It cannot fairly be said on this record that "[t]he inward consciousness of having committed a murder and a robbery and of being confronted with evidence of guilt which [petitioner] could neither deny nor explain seems enough to account for the confessions here." *Stein* v. *New York*, 346 U. S. 156, 185. It is true that, as in *Stein*, Reck did not confess until confronted with the incriminating statements of his companions. But beyond this the circumstances in *Stein* bear little resemblance to those involved in this case. The defendants in *Stein* were questioned a total of twelve hours during a thirty-two hour detention. Part of that time was spent working out a "bargain" with police officers. Neither defendant was "young, soft, ignorant or timid." *Stein, supra*, at 185. Nor were they "inexperienced in the ways of crime or its detection" or "dumb as to their rights." *Id.*, at 186. By contrast, Reck was in fact young and ignorant. He was in fact inexperienced in the ways of crime and its detection. Moreover, he was subjected to pressures much greater than were the defendants in *Stein*. He was held incommunicado and questioned over a much longer period. He was physically ill during much of that time, in pain, and weakened by lack of food. Confrontation with the confessions of his companions in these circumstances could well have been the event which made further resistance seem useless to Reck, whether he was guilty or not. On this record, therefore, the fact that his confession came hard upon the confessions of others who implicated him has little independent significance.

The State has made no effort to distinguish between the Saturday and Sunday confessions. Nor could it properly do so. The coercive circumstances preceding the first confession existed through Sunday. Reck remained in police custody, without a judicial hearing. He was subjected to further interrogation. He did not see counsel, family or friends between Saturday afternoon and

Sunday afternoon. There are no other facts in the record suggesting that the Sunday confession was an act independent of the confession extracted on Saturday. Both confessions are subject to the same infirmities. Under the Due Process Clause of the Fourteenth Amendment neither was admissible at Reck's trial.

The petitioner's detention is in violation of the Constitution of the United States, and he is therefore entitled to be freed therefrom. The judgments of the Court of Appeals and the District Court are vacated and the case remanded to the latter. On remand, the District Court should enter such orders as are appropriate and consistent with this opinion allowing the State a reasonable time in which to retry the petitioner. Cf. *Rogers* v. *Richmond*, 365 U. S. 534, 549; *Irvin* v. *Dowd*, — U. S. —, —.

Vacated and remanded.

SUPREME COURT OF THE UNITED STATES

No. 181.—October Term, 1960.

Emil Reck, Petitioner, v. Frank J. Pate, Warden. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 12, 1961.]

Mr. Justice Douglas, concurring.

Emil Reck at the age of twelve was classified as a "high grade mental defective" [1] and placed in an institution for mental defectives. He dropped out of school when he was sixteen. Though he was retarded he had no criminal record, no record of delinquency. At the time of his arrest, confession, and conviction he was nineteen years old.

He was arrested Wednesday morning, March 25, 1936. The next day, March 26, his father went to the police asking where his son was and asking to see him. The police would give him no information. On March 27 his father came to the police station again but was not allowed to see his son. Later the father tried to see his son at the hospital but was denied admission.

The father was denied the right to see his son over and again. The son was held for at least eight full days *incommunicado*. He was arraigned before a magistrate on April 2, 1956, only after he had confessed.

[1] At an interview taking place a few weeks after his arrest in 1936, Reck knew that the Mississippi was a big river, that New York was a big city, that Washington, D. C., was our capital, and that Hoover preceded Roosevelt. But he was unable to divide 25 by 5; he did not know how many weeks were in a year, how many feet in a yard, how many quarts in a gallon, when Columbus discovered America, who the opponents were in the Civil War, or the capitals of Illinois, England, France, or Germany.

The late Professor Alexander Kennedy of the University of Edinburgh has put into illuminating words the manner in which long-continued interrogation under conditions of stress can give the interrogator effective command over the prisoner.[2] The techniques—now explained in a vast literature—include (1) disorientation and disillusion; (2) synthetic conflict and tension; (3) crisis and conversion; (4) rationalization and indoctrination; (5) apologetics and exploitation.[3]

The device of "synthetic conflict and tension" is summarized as follows: [4]

> "Production by conditioning methods of a state of psychological tension with its concomitant physical changes in heart, respiration, skin and other organs, the feeling being unattached to any particular set of ideas. This is later caused to transfer itself to synthetic mental conflicts created out of circumstances chosen from the subject's life-history, but entirely irrelevant to the reasons for his detention. The object is to build up anxiety to the limits of tolerance so as to invoke pathological mental mechanisms of escape comparable to those of Conversion Hysteria."

Whether the police used this technique on Emil Reck no one knows. We do know from this record that Emil Reck was quite ill during his detention. He was so ill that he was taken to a hospital *incommunicado*. He was so ill he passed blood. What actually transpired no one will know. The records coming before us that involve the relations between the police and a prisoner during periods of confinement are extremely unreliable. The word of the police is on the side of orderly procedure,

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[2] Kennedy, The Scientific Lessons of Interrogation, Proc. Roy. Instn. 38, No. 170 (1960).

[3] *Id.*, pp. 96–97.

[4] *Id.*, p. 96.

nonoppressive conduct, meticulous regard for the sensibilities of the prisoner. There is the word of the accused against the police. But his voice has little persuasion.

We do know that long detention, while the prisoner is shut off from the outside world, is a recurring practice in this country—for those of lowly birth, for those without friends or status.[5] We also know that detention *incommunicado* was the secret of the inquisition and is the secret of successful interrogation in Communist countries. Professor Kennedy summarized the matter:[6]

> "From the history of the Inquisition we learn that certain empirical discoveries were made and recognised as important by a thoughtful and objective minority of those concerned. The first was that if a prisoner were once induced to give a detailed history of his past and to discuss it with his interrogators in the absence of threat or persuasion or even of evidence of interest, he might after an emotional crisis recant and confess his heresies. The second discovery was that true and lasting conversion could never be produced by the threat of physical torture. Torture not infrequently had the opposite effect and induced a negative mental state in which the prisoner could no longer feel pain but could achieve an attitude of mental detachment from his circumstances and with it an immunity to inquisition. The most surprising feature was the genuine enthusiasm of those who did recant. While these results were necessarily ascribed at the time to the powers of persuasion of the Inquistadores, it is evident in retrospect that something was happening which was often

[5] "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Anatole France as quoted in Cournos, A Modern Plutarch (1928), p. 27.

[6] *Id.*, p. 94.

beyond their control. The same facts come to light in the long history of Russian political interrogation. In the Leninist period, the success of the immensely tedious method of didactic interrogation then in use was similarly ascribed to the appeal of Marxist doctrine to reason. The fact is that in conditions of confinement, detailed history-taking without reference to incriminating topics and the forming of a personal relationship with an interrogator who subscribes to a system of political or religious explanation, there may occur an endogenous and not always predictable process of conversion to the ideas and beliefs of the interrogator."

Television teaches that confessions are the touchstone of law enforcement. Experience however teaches that confessions born of long detention under conditions of stress, confusion, and anxiety are extremely unreliable.

People arrested by the police may produce confessions that come gushing forth and carry all the earmarks of reliability. But detention *incommunicado* for days on end is so fraught with evil that we should hold it to be inconsistent with the requirements of that free society which is reflected in the Bill of Rights. It is the means whereby the commands of the Fifth Amendment (which I deem to be applicable to the States) are circumvented. It is true that the police have to interrogate to arrest; it is not true that they may arrest to interrogate.[6] I would hold that any confession obtained by the police while the

[6] In ordinary circumstances, the police, under law, are to conduct investigations of crime by interview, and not by interrogation. Typically, it is the Grand Jury or a Court, not the police, which has the power to compel testimony, subject to the limitations of relevance and privilege. See *United States* v. *Bufalino*, 285 F. 2d 408, 415, 416, 420. To allow the police to use their power to arrest as a substitute for the power of subpoena is, I think, to strip the Fifth Amendment of its meaning.

defendant is under detention is inadmissible, unless there is prompt arraignment and unless the accused is informed of his right to silence and accorded an opportunity to consult counsel. This judgment of conviction should therefore be reversed.

SUPREME COURT OF THE UNITED STATES

No. 181.—October Term, 1960.

Emil Reck, Petitioner, v. Frank J. Pate, Warden. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 12, 1961.]

Mr. Justice Clark, whom Mr. Justice Whittaker joins, dissenting.

Twenty-five years ago a jury found Reck guilty of the savage murder of Dr. Silber C. Peacock. His first attempt to upset that conviction came nine years later when he sought a writ of error to the Supreme Court of Illinois. It was denied by opinion, *People* v. *Reck*, 392 Ill. 311, 64 N. E. 526 (1946). This Court denied certiorari. *Reck* v. *Illinois*, 331 U. S. 855 (1947). In the same year the Illinois Supreme Court again denied Reck's application for discharge. The next year the United States District Court for the Northern District of Illinois did likewise. Then, in 1952, an application under the Illinois Post Conviction Hearing Act was filed to test the validity of Reck's 199-year sentence imposed by a jury 16 years previously. His application was denied after a full hearing by the trial court, and the Illinois Supreme Court affirmed by a unanimous opinion. *People* v. *Reck*, 7 Ill. 2d 261, 130 N. E. 2d 200 (1955). Petition for certiorari was again denied, without prejudice to the filing of appropriate proceedings in Federal District Court. 351 U. S. 942 (1956). This case was then filed in the United States District Court where no witnesses were heard, the court being satisfied with reviewing the record. Once again relief was denied, 172 F. Supp. 734, and the Court of Appeals affirmed. 274 F. 2d 250.

Today—25 years after his conviction—this Court overturns the decision of the original trial judge, the judg-

ment and findings of a state trial judge on post-conviction hearing, the unanimous opinion of the Supreme Court of Illinois on that appeal, decisions of both the Supreme Court of Illinois and a federal district judge on separate applications for habeas corpus and, finally, those of a federal district judge and Court of Appeals in this case. All of these courts are overruled on the ground that "a totality of coercive circumstances" surrounded Reck's confession. The Court second-guesses the findings of the trial judge and those of the only other trial court that heard and saw any of the witnesses, both of which courts impartially declared the confession to be entirely voluntary.

The Court has quoted at length and with approval the summary of the evidence by the United States district judge. I quote in the margin the findings of the two state judges who saw the witnesses and heard the evidence, one a few weeks after the events,[1] and the other sixteen

[1] The original trial judge, after a hearing on the admissibility of the confession, stated:

"The Court has listened attentively to all of the testimony presented in support of the exhibits and against the introduction of the exhibits. The law in this state is that the burden is on the People to establish by a preponderance of the evidence that a confession or what is introduced as a confession was made voluntarily and freely. If there was any coercion or promise of immunity or reward for making the confession, or if the person making the confession was abused in any way either by striking or threatening or any form of mental or physical abuse, then the confessions would not be free and voluntary confessions.

"After considering all the testimony introduced on this preliminary hearing, the Court finds that the confessions are free and voluntary; and the Court is satisfied that that is established not only by a greater weight of the evidence, but by an overwhelming weight of the evidence. Therefore, the Court will admit these confessions. The Court has admitted the confessions. Now, as to the weight that shall be given to the confessions, that is for the jury."

years thereafter.[2] A casual comparison of the three findings shows that the federal judge—to say the least—has imported conclusions and added embellishments not present in the cold record of the trial. I need only cite

[2] At the conclusion of the post-conviction hearing, the judge stated:

"Well, the defendant testified that he was arrested on March 25th and that he was taken to a hospital on March 27th. Now, without considering the testimony of the police officers at all, Mr. Kearney testified that he was an Assistant State's Attorney at that time and is now practicing law; that on Friday, at about 10 P. M., he went to the North Avenue Station, after having received a phone call from Chief Aitken; that he told everyone there that he was from the State's Attorney's Office; that he called Dr. Scatliff and Dr. Day and had them go to the County Hospital to examine the petitioner because the petitioner had complained that he was ill; that at the time he took the statement of the petitioner, a member of the Grand Jury was present and several doctors were present during the taking of the statement of the petitioner. He said that he and Assistant State's Attorney Crowley, now Judge Crowley, questioned Reck and Reck gave the answers. He says that he saw no marks or bruises on Reck. Reck at no time complained of any brutality. No one struck or threatened Reck in the presence of Mr. Kearney. He says that he first saw Reck and then the police brought him to the State's Attorney's Office from the County Hospital. Reck told Mr. Kearney that he had been to the County Hospital, but he didn't tell him why. Then Kearney called Dr. Scatliff and Dr. Day and asked them to go to the County Hospital to see what, if anything, was wrong with Reck. Dr. Scatliff testified that he saw Reck at the County Hospital in the middle of the night on Friday to Saturday and that Dr. Day was with him. That first, he made a visual examination; that when he arrived in the room Reck was asleep, but he was aroused, and Reck was asked if he was ill and Reck merely grunted. The doctor asked Reck if he was in pain and Reck said 'No.' He asked Reck what the trouble was and Reck pointed to his stomach. The doctor then testified that we looked him over, he and Dr. Day; that he, Dr. Scatliff, found no bruises or discolorations. Dr. Scatliff said that he pressed on the stomach of this petitioner and the petitioner said nothing. Again, on Sunday, he saw the petitioner and the petitioner had no marks or bruises; that he was asked if he had been mistreated and the petitioner said he had not. The petitioner

one example, where he finds that his "cold summary . . . carries an unexpressed import of police brutality . . . ." While the Court of Appeals at least *sub silentio*, overturned some of these findings, the State does not take issue with the basic facts in the summary but does strenuously object to its conclusory findings. Perhaps the explanation for these differences is best explained by the federal judge himself, when he finds that he has read "[t]he record . . . in the light most favorable" to Reck; and further that "Reck's confession was tested before a judge and jury who had the opportunity to observe witnesses and weigh other fresh evidence at first hand while I must make my decision on the basis of a cold and ancient record, *which can appear misleading.*" (Emphasis added.)

Although the Court says that it proceeds "upon the premise, as did the District Court, that the officers did not inflict deliberate physical abuse or injury upon Reck,"

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was asked if he had eaten and the petitioner said he had eaten. On cross-examination he testified that he did not examine the petitioner's stool or urine; that he pressed on his abdomen and there was no evidence of pain; that he had been told that petitioner bled from the mouth, while at the police station, and he testified that bleeding from the mouth could be caused by dental disorders, tumors, by injuries to the stomach, that he had been told that defendant had a gastric ulcer and that, in his opinion, a gastric ulcer could cause bleeding. He also testified on recross examination that a blow on the stomach would aggravate and cause a dormant ulcer to become active and cause bleeding. Captain Aitken testified that while he was talking to the defendant, to the petitioner, the petitioner commenced to bleed from the mouth; that he asked the petitioner what the trouble was, and the petitioner said he had ulcers; that then the doctor recommended that the petitioner be taken to the hospital. Mr. Blair Varnes also testified, an attorney, that he was present at the taking of one of the statements, and he said he saw no bruises on the petitioner and the petitioner made no complaint to him. I do not believe there is sufficient evidence before this Court to disturb the finding of the jury.

it nonetheless finds the confession to have been coerced. I assume, therefore, that the Court bases its reversal on psychological or mental coercion. In so doing it goes far beyond the holding of any of the prior cases of this Court.

I shall not repeat the facts except to note that Reck was arrested on Wednesday; he was not interrogated concerning Dr. Peacock's murder until Friday, when he immediately became ill, and was hospitalized; later that night all three of his confederates confessed; confronted with them on Saturday—each accusing him of participation in the murder—he confessed. There was no evidence of physical brutality, no request for counsel, nor, unlike *Turner* v. *Pennsylvania*, 338 U. S. 62 (1949), for relatives or friends. Nor did he ask for food or make any indication of any desire or need therefor, showing, in the light of the record, nothing more than the lack of interest in food of one who had suffered from stomach ulcers for years. How the Court can now—25 years later—find on this "cold" record that these circumstances amounted to mental or psychological coercion is beyond my comprehension. I agree with the score of judges who have decided to the contrary.

Since mental coercion is the keystone of its rationale, the Court properly sets to one side the cases involving physical brutality, *e. g.*, *Brown* v. *Mississippi*, 297 U. S. 278 (1936). While they dealt with factors bearing upon the mental state of the defendants, the Court properly distinguishes cases involving threats of mob violence, the wearing down of the accused by protracted questioning, threats against members of the defendant's family, and those in which deception was practiced.[3] Nor can Reck be classified as a mental defective, as was the case in *Blackburn* v. *Alabama*, 361 U. S. 199 (1960).

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[3] *E. g.*, *Payne* v. *Arkansas*, 356 U. S. 560 (1958); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Harris* v. *South Carolina*, 338 U. S. 68 (1949); *Spano* v. *New York*, 360 U. S. 315 (1959).

The Court relies heavily on *Turner* v. *Pennsylvania*, *supra*. I do not agree that it presented this Court with "a totality of coercive circumstances" significantly less "aggravated" than the situation presented here. In *Turner* the Court reviewed the Pennsylvania Supreme Court's affirmance of petitioner's conviction by a jury. In the present case no claim is made that the codefendants' confessions, with which Reck was confronted, were in fact not made and did not in fact implicate Reck in the murder of which he was convicted. In *Turner*, however, the petitioner "was falsely told that other suspects had 'opened up' on him." 338 U. S., at 64. Such a falsification, in my judgment, presents a much stronger case for relief because at the outset Pennsylvania's officers resorted to trickery. Moreover, such a psychological artifice tends to prey upon the mind, leading its victim to either resort to counter charges or make "further resistance seem useless," and abandonment of claimed innocence the only course to follow.

Further, the issue of voluntariness of the confession in *Turner* was submitted to the jury, but the trial judge refused to charge "that in considering the voluntariness of the confession the prolonged interrogation should be considered." At p. 65. And the appellate court considered it an indifferent circumstance that "a convicted murderer" was held five days in jail. 358 Pa. 350, 357. Finally, in *Turner* the Supreme Court of Pennsylvania affirmed the conviction in an opinion stressing the probable guilt of the petitioner and assuming that the alternatives before it were either to approve the conduct of the police or to turn the petitioner 'loose upon [society] after he has confessed his guilt.'" 338 U. S., at 65. This Court might well have disagreed in that case with findings so made, and, with less hesitation than is appropriate here, where the determinations of voluntariness have been so constant and so numerous, have reached an opposite

conclusion. In this case we are not considering the validity of a conviction by certiorari to the court affirming that judgment. Voluntariness has not been here inadequately tested by a standard which refuses to take account of relevant factors. Cf. *Rogers* v. *Richmond*, — U. S. — (1960). To the contrary, a proper standard has been successively applied by at least two trial courts and several appellate courts, no one of which felt itself forced to choose between what it considered equally undesirable results, and with whose conclusions this Court may not so lightly disagree.

Similarly, in *Fikes* v. *Alabama*, 352 U. S. 191, 196–197 (1957), also relied on by the Court, the confession was wrung from an "uneducated Negro, certainly of low mentally, if not mentally ill." Fikes "was a weaker and more susceptible subject than the record in that case reveals Turner to have been." Unlike Reck, Fikes was removed from the local jail to a state prison far from his home and the Court recognized that petitioner's location was a fact "to be weighed." So, too, in *Fikes* the petitioner's lawyer was barred from seeing him, unlike the situation here, where no request for counsel was made.

Of course, I agree with the Court that confession cases are not to be resolved by color-matching. Comparisons are perhaps upon occasion unavoidable, and, may even be proper, as in a case "on all fours" whose facts approach identity with those of the one claimed apposite. I do not find that to be the situation here, however. In my view, the Court today moves onto new ground, and does not merely retread the steps it took in *Turner*. In my judgment, neither the elusive, measureless standard of psychological coercion heretofore developed in this Court by accretion on almost an *ad hoc*, case-by-case basis, nor the disposition made in *Turner* requires us to disagree with more than a score of impartial judges who have previously considered these same facts. Perhaps, as these cases

indicate; reasonable minds may differ in the gauging of the cumulative psychological factors upon which the Court bases its reversal, but in what case, I ask, has a court dealing with the same extrinsic facts, a quarter of a century after conviction, overturned so many decisions by so many judges, both state and federal, entirely upon psychological grounds? When have the conclusions of so many legal minds been found to be so unreasonable by so few?

Certainly, I walk across this shadowy field no more surefootedly than do my Brothers, but after reading the whole record and the opinions of all of the courts that have heard the case I am unpersuaded that the combined psychological effect of the circumstances somehow, in some way made Reck speak. The fact is, as the Court of Appeals said, when confronted with and accused by all three of his confederates, Reck knew the "dance was over and the time had come to pay the fiddler," quoting from Mr. Justice Jackson's opinion for the Court in *Stein* v. *New York*, 346 U. S. 156, 186 (1953).